No. 98-84-CFX

Title: National Collegiate Athletic Association, Petitioner
v.
R. M. Smith

Docketed:
July 15, 1998

Court: United States Court of Appeals for
the Third Circuit

Entry	Date	Proceedings and Orders
	Jul 14 1998	Petition for writ of certiorari filed. (Response due August 28, 1998)
	Jul 27 1998	Order extending time to file response to petition until August 28, 1998.
	Aug 26 1998	Brief of respondent R. M. Smith in opposition filed.
	Sep 8 1998	Reply brief of petitioner National Collegiate Athletic Association filed.
	Sep 9 1998	DISTRIBUTED. September 28, 1998
	Sep 29 1998	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT January 20, 1999. **********
	Nov 10 1998	Brief of petitioner NCAA filed.
	Nov 10 1998	Joint appendix filed.
	Nov 10 1998	Brief amici curiae of American Council on Education, et al. filed.
	Dec 4 1998	CIRCULATED.
	Dec 4 1998	Record filed.
	Dec 8 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 8 1998	Brief amici curiae of Trial Lawyers for Public Justice, et al. filed.
	Dec 8 1998	Brief amici curiae of National Women's Law Center, et al. filed.
	Dec 8 1998	Brief amicus curiae of United States filed.
	Dec 8 1998	Brief of respondent R.M. Smith filed.
	Dec 8 1998	Brief amici curiae of Michael Bowers, et al. filed.
	Dec 8 1998	LODGING consisting of ten copies of two letters submitted by counsel for the respondent, received and distributed.
	Dec 10 1998	Record filed.
	Dec 14 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 21 1998	LODGING consisting of ten copies of a letter submitted by counsel for amici Michael Bowers, et al.
	Dec 23 1998	Reply brief of petitioner National Collegiate Athletic Association filed.

No. 98-84-CFX

Entry	Date	Proceedings and Orders
	Jan 20 1999	ARGUED.

No. 98-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,
v.
R. M. SMITH,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

ELSA KIRCHER COLE
General Counsel
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
6201 College Boulevard
Overland Park, KS 66211
(913) 339-1906

MARTIN MICHAELSON
JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5810

JOHN J. KITCHIN
ROBERT W. MCKINLEY
SWANSON, MIDGELEY, GAGWERE, KITCHIN & MCLARNEY
922 Walnut Street
Suite 1500
Kansas City, MO 64106
(816) 842-6100
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

84 pp

QUESTION PRESENTED

Whether the Court of Appeals correctly held—in conflict with this Court's decision in *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), decisions of other federal circuits, and the clear intent of Congress—that the National Collegiate Athletic Association, a private organization that does not itself receive federal financial assistance, is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, because it receives payments from entities that do.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98——

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R. M. SMITH,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The National Collegiate Athletic Association ("NCAA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 139 F.3d 180 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Western District of Pennsylvania is reported at 978 F. Supp. 213 and reprinted at App. 21a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1998. App. 37a-38a. Both parties filed timely petitions for rehearing and suggestions for rehearing in

banc, which were denied on April 20, 1998. *Id.* 39a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681(a), provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Pertinent provisions of Title IX, the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*, are reprinted at App. 41a-47a. Pertinent regulations are reprinted at *id.* 47a-50a.

INTRODUCTION

This case concerns the reach of Title IX to private entities or programs that do not themselves receive federal financial aid. Title IX by its terms covers programs or activities "receiving Federal financial assistance." 20 U.S.C. § 1681(a). In *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597, 610 (1986), this Court held that "Title IX"—like the other program-specific statutes with the same federal-funding trigger—"draws the line of federal regulatory coverage between the recipient and the beneficiary."[1] It

[1] In addition to Title IX, the program-specific statutes include Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d (emphasis added), which prohibits discrimination against persons on the basis of race, color, or national origin in "any program or activity *receiving Federal financial assistance*," and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 (emphasis added), which prohibits discrimination against handicapped persons in "any program or activity *receiving Federal financial assistance*." As explained below, this Court has recognized that these laws are modeled on Title VI, and that the identical language in these laws was intended to be given the same meaning.

"covers those who *receive* the aid, but does not extend as far as those who *benefit* from it." *Id.* at 607 (emphasis added). The "key," then, in gauging Title IX's applicability, is to determine whether a program or entity is a "recipient" of federal aid. *Id.*

The NCAA—a private association of the Nation's colleges and universities—does not receive federal financial aid. Most of its member institutions, on the other hand, do. The Court of Appeals below held that the NCAA is covered by Title IX because "the NCAA receives dues"—accounting for a tiny fraction of its annual operating revenues—"from its members which receive federal funds." App. 16a. That ruling directly conflicts with this Court's decision in *Paralyzed Veterans*, the decisions of other federal circuits on the reach of Title IX and the other program-specific statutes to private entities (including the NCAA), and the clear intent of Congress in enacting these statutes to limit coverage "to those who *actually* 'receive' federal financial assistance." 477 U.S. at 605 (emphasis added). This Court should grant certiorari to resolve the multiple conflicts on the important question presented.

STATEMENT OF THE CASE

The NCAA is a voluntary, unincorporated association of some 1200 members, consisting primarily of public and independent colleges and universities across the country. The NCAA does not receive federal financial assistance—whether in the form of grants, loans, or participation in other federal aid programs—and, instead, funds its activities through the receipt each year of approximately $200 million in revenues from television royalties, championship events, and various sales and services. The NCAA also collects about $900,000 annually in dues from its member institutions, which account for less than one percent of the NCAA's total annual operating revenues. In

contrast to the NCAA, most NCAA member institutions receive federal financial assistance in the form of grants, loans, or participation in various federal programs.[2]

Formed in 1906 in response to public outcry over the state of intercollegiate athletics, "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports." *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984). Toward this end, the NCAA adopts and helps to enforce rules governing athletic events, academic eligibility, recruitment, admissions, financial aid, and size of athletic squads and coaching staffs. When colleges and universities join the NCAA, they agree to abide by these rules. This case arises because of the NCAA's enforcement of one of these rules—NCAA Bylaw 14.1.8—which prohibits a student-athlete from participating in intercollegiate athletics at a postgraduate institution other than the one from which she received her undergraduate degree. *See* App. 3a-4a & n.2.

Respondent Renee M. Smith ("Smith") played intercollegiate volleyball for St. Bonaventure University during the 1991-92 and 1992-93 athletic seasons. She elected not to play during the 1993-94 season, and graduated early from St. Bonaventure (in two and a half years). Smith then entered a postgraduate program at Hofstra University and, in 1995, enrolled in another postgraduate program at the University of Pittsburgh. The NCAA denied Smith eligibility to play intercollegiate volleyball for Hofstra during the 1994-95 season, and for the University of Pittsburgh during the 1995-96 season, pursuant to Bylaw 14.1.8. Smith thereupon brought the instant

[2] Colleges and universities are eligible to participate in a number of federal grant and other programs, including those covering student loans, construction and maintenance of education facilities, and faculty training and development. *See* 34 C.F.R. pt. 100, App. A (listing statutory programs).

action in the United States District Court for the Western District of Pennsylvania, alleging that the NCAA had violated Title IX and certain other laws by refusing to grant her a waiver from Bylaw 14.1.8. *See* App. 3a-4a.[3]

The NCAA moved to dismiss on the ground that Title IX covers only programs or entities "receiving Federal financial assistance," 20 U.S.C. § 1681(a), and Smith failed adequately to allege that the NCAA receives such assistance. Moreover, even if the complaint were sufficient, the NCAA argued, Smith could not establish that the NCAA receives any federal financial assistance that, as a matter of law, would render it subject to Title IX. In response, Smith argued that the allegations were sufficient, and that the NCAA is subject to Title IX because its *member institutions* receive federal funding and, " 'although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees.' " App. 30a (quoting Pl's Br. 6).

The District Court (Ambrose, J.) dismissed Smith's complaint for failure to state a claim upon which relief could be granted. *Id.* 33a. The court agreed with the NCAA that Smith had failed adequately to allege that the NCAA is a recipient of federal financial assistance. *Id.* 31a. It further held that Smith "has failed to state a claim under Title IX," even assuming the NCAA's member institutions receive federal funds and such "funding may ultimately be paid from the member institution[s]

[3] Smith also alleged that NCAA Bylaw 14.1.8 unreasonably restrains trade and has an adverse effect on competition in violation of the Sherman Act, 15 U.S.C. § 1. The Court of Appeals affirmed dismissal of this claim, *see* App. 5a-12a, and it is not at issue here. In addition, Smith brought a state law breach of contract claim; the District Court, however, declined to exercise supplemental jurisdiction over that claim after dismissing the federal counts. That ruling is also not at issue here. *Id.* 34a. This petition is addressed solely to Smith's Title IX claim.

to the NCAA in membership dues or other fees." *Id.* 32a. Such a " 'connection[]' with federal funding," the court explained, is "too far attenuated to qualify [the NCAA] as a recipient of federal funds thus subjected to the mandates of Title IX." *Id.*

Shortly after the District Court entered its order dismissing Smith's Title IX claim, Smith sought leave to amend her complaint to allege that " '[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance.' " *Id.* 18a (quoting amended complaint). Having already concluded that the "connection" by which Smith sought to prove that the NCAA was an indirect recipient of federal funds was too attenuated as a matter of law to trigger Title IX, the District Court denied Smith's request, *id.* 36a, and she appealed.

The Third Circuit reinstated Smith's Title IX claim. According to the Court of Appeals, the District Court should have allowed Smith's Title IX claim to proceed on the basis of her proposed amendment because it "alleges that the NCAA receives dues from member institutions, which receive federal funds." *Id.* 19a. "[T]his allegation," the court held, "would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss." *Id.*

In so holding, the Court of Appeals recognized that this Court in *United States Department of Transportation* v. *Paralyzed Veterans of America, supra,* held that Section 504 does *not* extend to entities which simply benefit from—as opposed to receive—federal financial assistance, and further acknowledged that Section 504 "contains language *identical* to that of Title IX * * * regarding receipt of federal assistance." App. 14a (emphasis

added).[4] "Notwithstanding the parallel language of [Section 504] and Title IX," however, the Court of Appeals chose "not [to] apply the *Paralyzed Veterans* Court's definition of 'recipient' to Title IX." App. 15a. The sole reason that the court gave for departing from *Paralyzed Veterans* was that an administrative regulation under Title IX "defines a recipient as an entity 'which operates an educational program or activity which *receives or benefits*' from federal funds." *Id.* (quoting 34 C.F.R. § 106.2(h)) (emphasis in Court of Appeals opinion). That regulation, the court held, "require[d]" it to "reach a different result." *Id.*

Based on this reasoning, the Court of Appeals held that the fact "that the NCAA receives dues from its members which receive federal funds * * * would subject the NCAA to the requirements of Title IX," and thus ruled that Smith's Title IX claim was entitled to proceed. *Id.* 16a. The NCAA filed a timely petition for rehearing and suggestion for rehearing in banc, which was denied on April 20, 1998. *Id.* 39a.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISION IN *PARALYZED VETERANS.*

One of the principal considerations governing the exercise of this Court's certiorari jurisdiction is whether a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). The Third Circuit decision in this case directly conflicts with this Court's decision in

---

[4] Title IX and Section 504—enacted one year after Title IX—were both modeled on Title VI, which, as noted, contains the identical funding-based trigger. *See* note 1, *supra*; *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 66 U.S.L.W. 4501, 4505 (U.S. June 22, 1998); *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-696 & n.16 (1979) (recounting legislative history of Title IX).

Paralyzed Veterans. Indeed, while the broad significance of this case calls for plenary review, the Third Circuit decision is so clearly contrary to *Paralyzed Veterans* as to warrant summary reversal.

The question in *Paralyzed Veterans* was whether Section 504 of the Rehabilitation Act—which prohibits discrimination against handicapped persons in any program or activity "receiving Federal financial assistance," 29 U.S.C. § 794—applies to commercial airlines. Airlines do not receive federal aid, but airport operators do. 477 U.S. at 604-605. In arguing that Section 504 covers airlines, the plaintiffs in *Paralyzed Veterans* reasoned that "airlines are 'indirect recipients' of the aid to airports," because "airport operators convert the [aid] into runways and give the federal assistance—now in the form of a runway—to the airlines." *Id.* at 606. This Court disagreed, holding that "Section 504, *like Title IX* * * *, draws the line of federal regulatory coverage between the recipient and the beneficiary," and that Section 504 accordingly "covers those who receive the aid, but does *not* extend as far as those who benefit from it." *Id.* at 607, 610 (emphases added).

The Third Circuit decision below clearly conflicts with *Paralyzed Veterans.* As the Supreme Court itself recognized in *Paralyzed Veterans*, Title IX and Section 504 contain the identical federal-funding trigger, and were intended to be given the same meaning. *Id.* at 610. Like the airlines in *Paralyzed Veterans*, the NCAA does not itself receive federal financial aid, and—at most—only indirectly benefits from the federal aid received by its member institutions in the form of dues paid by members to the NCAA. Thus, under the rule of *Paralyzed Veterans*, the NCAA is not a recipient of federal financial assistance, but rather—at most—an indirect beneficiary beyond Title IX's reach. The Third Circuit's contrary conclusion violates the central teaching of *Paralyzed Veterans*: that federal coverage under the program-specific

statutes does not "follow[] the aid past the recipient to those who merely benefit from the aid." *Id.* at 607.

Indeed, the conclusion that federal regulatory coverage is not triggered is even clearer here than in *Paralyzed Veterans.* There can be no serious question that the airlines in *Paralyzed Veterans* benefit from the federal aid received by airports; that aid is used to build the runways on which airlines land and to operate the air traffic control system that guides them in. Here, by contrast, it is by no means evident that the NCAA even benefits from the federal aid to colleges and universities. Indeed, as Smith herself acknowledges, there is no guarantee that this aid—earmarked for specific purposes other than the NCAA or its mission—will ultimately find its way to the NCAA in the form of dues. *See* App. 30a (quoting Pl's Br. 6). Even if it does, those dues account for only a tiny fraction (less than one percent) of the NCAA's annual operating revenues.[5]

The linchpin of the Supreme Court's analysis in *Paralyzed Veterans* underscores the conflict with the Third Circuit decision below. In rejecting the indirect beneficiary analysis, the *Paralyzed Veterans* Court recognized that Congress intended coverage under the program-specific statutes to be premised on the contract between the government and the actual aid recipient. As Justice Powell wrote for the Court, "[u]nder the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the non-discrimination pro-

[5] Because the NCAA does not dispute that "[it] receives dues from its members which receive federal funds," App. 16a—the sole predicate for the Third Circuit ruling that the NCAA may be subjected to Title IX—this case presents a good vehicle for deciding the important question presented, which, as we explain below, has serious implications for numerous organizations in addition to the NCAA. *See* Part III, *infra*.

vision." 477 U.S. at 605. That is a "*quid pro quo* for the receipt of federal funds." *Id.* (quotation omitted). The rationale applied by the Third Circuit below disregards this important contractual limitation on Title IX's reach—which this Court expressly reaffirmed just last Term in *Gebser* v. *Lago Vista Independent School District*, 66 U.S.L.W. at 4505—and, instead, gives the statute "almost limitless coverage," "a result Congress surely did not intend." 477 U.S. at 608, 609.[6]

Although the Third Circuit recognized that Title IX contains the identical trigger as Section 504, it chose "not

[6] This contractual analysis is not only analytically superior to the limitless indirect beneficiary rationale adopted by the Third Circuit to extend Title IX to the NCAA, but is dictated by the nature of the legislation at issue. Like the statute on which they were modeled (Title VI), Title IX and Section 504 were enacted pursuant to the Spending Clause. *See Lago Vista*, 66 U.S.L.W. at 4505; *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 598-599 (1983). In exercising its spending power, Congress is free to attach conditions to the receipt of funding so long as it does so in clear terms. *See Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Extending Title IX beyond the actual recipients that are in a position to accept or reject such conditions—and that in fact are given notice of such conditions—would give the statute unintended and unsupportable breadth.

"Title IX's contractual nature" was the underpinning for this Court's decision in *Lago Vista*, holding that a school district may not be held liable under Title IX for the acts of its teachers unless it "has actual notice of * * * the teacher's misconduct." 66 U.S.L.W. at 4502, 4505. In so holding, the Court emphasized that Title IX "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds," and that this "contractual framework" prohibits a court from imposing liability where "the receiving entity of federal funds [lacks] notice that it will be liable for a monetary award" for the acts in question. *Id.* (quotation omitted). The Third Circuit did not have the benefit of *Lago Vista* when it decided this case, but it follows *a fortiori* that if Title IX does not cover the acts of a federal funding recipient's own employees in the circumstances of *Lago Vista*, then Title IX does not extend to an entity—such as the NCAA—that is not a federal funding recipient in the first place.

[to] apply the *Paralyzed Veterans* Court's definition of 'recipient' to Title IX" because it believed that an administrative regulation under Title IX compelled a different result. App. 15a. As the Court of Appeals put it, "the broad regulatory language under Title IX * * * defines a recipient as an entity 'which operates an educational program or activity which *receives or benefits*' from federal funds." *Id.* (quoting 34 C.F.R. § 106.2(h)) (emphasis in opinion). *But the Court of Appeals omitted the pertinent and critical part of the regulatory definition*—the clause immediately preceding the one it quoted in explaining its refusal to follow the Supreme Court's opinion in *Paralyzed Veterans*. In full, the regulation defines "recipient" to include

> any public or private agency, institution or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient *and* which operates an educational program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee thereof. [34 C.F.R. § 106.2(h) (emphasis added).]

Contrary to the supposition of the Court of Appeals, it is not enough—even under the regulatory definition upon which the Third Circuit relied to go beyond *Paralyzed Veterans*—that an entity "operates an educational program or activity which receives or benefits" from federal funds for that entity to be a covered recipient under Title IX. *Id.* Instead, as the italicized "and" in the quoted text above unambiguously confirms, the entity itself must *also* be one "to whom Federal financial assistance is extended directly or through another recipient." *Id.* That of course is the issue in this case, and that issue is controlled by this Court's decision in *Paralyzed Veterans*.[7]

[7] The Third Circuit's reading of the Title IX regulation is flawed in another respect: as this Court has made clear on two separate occasions, the specific language upon which the Court of Appeals

The fact that the regulation notes that the recipient of federal funds may be "through another recipient" simply reflects this Court's decision in *Grove City College* v. *Bell*, *supra*, where the Court held that a college may be covered by Title IX by virtue its students' receipt of federal tuition grants. That holding, however, was explicitly based on the "powerful evidence of Congress' intent" that colleges are in fact an *intended* recipient of the federal aid in question. 465 U.S. at 569; *see id.* at 565-570 (reviewing legislative record). In other words, *Grove City* stands for the proposition that an indirect *recipient* may be covered by Title IX where it is clear that Congress itself viewed that entity as a recipient of the financial aid. It does not stand for the proposition that a mere beneficiary is covered—the proposition this Court expressly rejected in *Paralyzed Veterans*. *Grove City* thus lends no support to the Third Circuit decision in this case, where there is absolutely no indication (or allegation) that the NCAA is an intended recipient of the federal aid received by colleges or universities, and in fact that aid is earmarked for purposes *other than* NCAA dues.

This Court confirmed this reading of *Grove City* in *Paralyzed Veterans*, when it rejected the same basic argu-

---

relied to go *beyond* the rule of *Paralyzed Veterans* was included to serve a *limiting* function required by Title IX—*i.e.*, to "conform [the regulation] with the [program-specific] limitations Congress enacted in §§ 901 and 902." *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 539 (1982); *accord Grove City College* v. *Bell*, 465 U.S. 555, 574 (1984). In 1988 Congress broadened the scope of Title IX to apply institution wide, *see* Civil Rights Restoration Act of 1987 ("CRRA"), 20 U.S.C. § 1687, but it left undisturbed the existing funding trigger—as interpreted by *Paralyzed Veterans*. *See* S. Rep. No. 100-64, at 29 (1987) (CRRA "does not alter what is defined as 'federal financial assistance,'" as that term has been construed under Title IX, Title VI, and Section 504, and "does not overrule or alter the Supreme Court ruling in [*Paralyzed Veterans*]."); 55 Fed. Reg. 52136, 52138 (Dec. 19, 1990) (same).

ment—also based on *Grove City*—made by the plaintiffs in *Paralyzed Veterans*:

> [Plaintiffs] also find support for their position in *Grove City*'s recognition that federal financial assistance could be either direct or indirect. This argument confuses intended *beneficiaries* with intended *recipients*. * * * While *Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid. [*Paralyzed Veterans*, 477 U.S. at 606-607 (emphasis in original).]

The "proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid," *id.* at 607—flatly rejected by this Court in *Paralyzed Veterans*—is precisely the principle that the Third Circuit adopted and applied in this case to extend Title IX to the NCAA.[8]

The result of the Third Circuit's abrupt dismissal of *Paralyzed Veterans* and truncated reading of the regulation is the very vice that the Supreme Court sought to avoid in *Paralyzed Veterans*: the decision gives the statu-

---

[8] This interpretation conflicts with Congress' intent in enacting the federal-funding trigger for the program-specific statutes. As one commentator has recounted, in drafting Title VI Congress initially contemplated conditioning coverage on the receipt of "'direct *or indirect* financial assistance.'" Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof"*, 78 Mich. L. Rev. 608, 614 (1980) (quoting legislative record; emphasis added). But the reference to "indirect" assistance was later deleted from the draft bill. *Id.* at 614-615. As this Court recognized in *Cannon*, 441 U.S. at 696, and reaffirmed in *Lago Vista*, 66 U.S.L.W. at 4505, Title IX was modeled on Title VI and was intended to be interpreted the same way. And, of course, in construing these statutes, a court must be "directed by [the statutes'] words, and not by the discarded draft." *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993).

tory program "almost limitless coverage," 477 U.S. at 608, eliminating the "contractual" backstop that Congress erected in enacting Title IX to ensure that only actual recipients of federal aid would be covered. *Id.* at 605. Thus, the Third Circuit's reasoning would, on its face, extend Title IX and the other program-specific laws to practically *any* entity which receives payments from a college or university that, in turn, receives federal financial assistance. The company that manufactures the test tubes used in the laboratory, the athletic equipment or apparel manufacturer, the facilities maintenance contractor, the firm that sells the ink used for the college catalogue—all of these would be covered "recipients" under the Third Circuit's logic, though plainly none of them was intended to be reached by Congress.[9]

The Third Circuit's singular reliance on the regulatory definition of recipient conflicts with this Court's decisions in another important respect. As the Third Circuit explained, it declined to apply the rule of *Paralyzed Veterans* because, in its view, doing so would render the Title IX regulation a "nullity." App. 16a. Regulations fall if they are inconsistent with Supreme Court precedent, however, not the other way around. In *Paralyzed Veterans*, the Court construed what the Third Circuit itself called statutory "language identical to that of Title IX." App. 14a. Once the Court had done so, no agency was free to prescribe an alternative view of the meaning of that statutory language in regulations. As a unanimous Court recently explained, "[o]nce we have determined a statute's

[9] The Third Circuit decision also leads to absurd results in the area of enforcement. As this Court has recognized, "[t]he ultimate sanction for noncompliance [with Title IX] is termination of federal funds or denial of future grants." *North Haven Bd. of Educ. v. Bell*, 456 U.S. at 514-515 (footnote omitted). It is unclear how such measures could be taken against an entity, such as the NCAA, which neither receives nor seeks federal funds and, at most, benefits only tangentially from receipt of such funds by separate entities.

meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Neal* v. *United States*, 516 U.S. 284, 295 (1996) (citing cases). Thus, even assuming the Third Circuit properly construed the regulation, the result it reached is still irreconcilable with *Paralyzed Veterans* and this Court's precedents.[10]

Since *Paralyzed Veterans*, affected agencies have amended their Section 504 regulations to "delete[] the phrase 'or benefiting from' [federal financial assistance]," explaining that this change was required by *Paralyzed Veterans*, "which held that air transportation services provided by airlines were not part of the covered program or activity because the airlines were not the intended recipient of the Federal financial assistance to airports, even if airlines benefited from that assistance." 55 Fed. Reg. at 52138. The "or benefits from" language has yet to be deleted from 34 C.F.R. § 106.2(h), but it was error for the Third Circuit to give effect to that language in an effort to bypass this Court's interpretation in *Paralyzed Veterans*, which—as this Court made explicit in *Paralyzed Veterans*—applies with equal force to Title IX.

II. THE THIRD CIRCUIT DECISION CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUITS.

The conflict does not end with *Paralyzed Veterans*. The Third Circuit decision below also conflicts with decisions of other federal circuits on the reach of the pro-

[10] While the Court in *Paralyzed Veterans* did not address the Title IX regulations, it made clear that its construction of the operative funding language in Section 504 applied to each of the program-specific statutes, including Title IX. *See* 477 U.S. at 605. And, when *Paralyzed Veterans* was decided, the same regulation on which the Third Circuit grounded its decision in this case was in existence, yet did not deter this Court from its ruling. *See* 34 C.F.R. § 106.2(h) (1986).

gram-specific statutes, providing an alternative basis for certiorari. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals"). The volume of case law in the federal courts of appeals on the application of the program-specific statutes to entities or individuals that are not themselves recipients of federal funds underscores the recurring nature and importance of the basic question presented.

To begin with, the Third Circuit's refusal to follow this Court's interpretation of Section 504's federal-funding trigger in *Paralyzed Veterans* conflicts with decisions of other circuits expressly recognizing that Congress intended the parallel language in Title IX, Section 504, and Title VI to be given the same meaning. *See, e.g., Doe* v. *Attorney General of United States*, 941 F.2d 780, 794 (9th Cir. 1991) ("Congress originally patterned section 504 after Title VI of the Civil Rights Act of 1964 and Title IX * * * and assumed enforcement for each would be the *same*.") (footnote omitted; emphasis added) (citing legislative materials); *United States* v. *Alabama*, 828 F.2d 1532, 1548 n.63 (11th Cir. 1987) ("Title IX * * * and section 504 of the Rehabilitation Act of 1973 were modeled after title VI and contain identical language. The Supreme Court has assumed the meaning of this program-specific language to be the *same* for all three statutes.") (emphasis added) (citing Supreme Court precedent), *cert. denied*, 487 U.S. 1210 (1988); *Foss* v. *City of Chicago*, 817 F.2d 34, 36 n.1 (7th Cir. 1987) (same).

As the Ninth Circuit explained in *Doe*, "[t]he pattern was to provide that no person could 'be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity *receiving Federal financial assistance*,' whether on the basis of handicap in section 504, sex in Title IX, or race in Title VI." 941 F.2d at 794 n.20 (emphasis added). The Third Circuit decision in this case self-consciously extends the reach of Title IX far beyond that of Section 504 and Title VI—to cover indirect beneficiaries of federal assistance, such as the NCAA, that do not themselves receive federal aid—in direct conflict with these court of appeals decisions, not to mention *Paralyzed Veterans* and the clear intent of Congress to limit *each* of the program-specific statutes with the identical funding trigger "to those who *actually* 'receive' federal financial assistance." 477 U.S. at 605 (emphasis added).

Not surprisingly, the Third Circuit decision also conflicts with decisions of other circuits faithful to *Paralyzed Veterans*. Thus, for example, in *Grzan* v. *Charter Hospital of Northwest Indiana*, 104 F.3d 116, 119-120 (7th Cir. 1997), the Seventh Circuit held that Section 504 does not cover employees of a direct recipient of federal aid, even though they receive payments—in the form of wages—from a federal funding recipient. In reaching this result, the Seventh Circuit specifically relied upon *Paralyzed Veterans* for the proposition that "benefiting from a federally financed program, *even where the benefits are financial*, does not necessarily constitute the receipt of federal funding." *Id.* at 120 (emphasis added). As the Fourth Circuit observed in rejecting a similarly far-fetched claim, if the program specific statutes extended to "such indirect beneficiaries of federal largesse, consistency would demand that [they] apply to every customer of every enterprise subsidized by the federal government." *Disabled in Action* v. *Mayor & City Council*, 685 F.2d 881, 884-885 (4th Cir. 1982).

The decision below is also at odds with *Gallagher* v. *Croghan Colonial Bank*, 89 F.3d 275 (6th Cir. 1996). The plaintiff in that case argued that a bank was subject to Section 504 because, although not a direct recipient of federal financial assistance, the bank "makes student loans which are subsidized and guaranteed with federal funds." *Id.* at 277. Following *Paralyzed Veterans*, the Sixth Cir-

cuit affirmed the dismissal of this claim on the ground that the bank was not covered by Section 504. As the court explained, federal coverage "does not follow federal aid past the intended recipient to those who merely derive a benefit from the aid or receive compensation for services rendered pursuant to a contractual arrangement." *Id.* at 278 (quotation omitted). *But see Moore* v. *Sun Bank*, 923 F.2d 1423, 1432 (11th Cir. 1991) (holding that banks receiving federal default reimbursements on loans guaranteed by the Small Business Administration are covered by Section 504).[11]

The Third Circuit decision also conflicts with decisions involving the third-party liability of actual federal funding recipients. For example, in *Rowinsky* v. *Bryan Independent School Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996), the Fifth Circuit held that a public school may not be held liable under Title IX for

11 *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996), illustrates the circumstances in which the indirect receipt of federal aid may trigger coverage. In that case, the Sixth Circuit held that a railroad was subject to Section 504, where the railroad "receives government money for the improvement of railroad crossings," which it then "owns." *Id.* at 786-787. The railroad argued that federal law was not triggered under *Paralyzed Veterans* because, pursuant to the federal program at issue, funds are distributed first to the states and then to railroads. *Id.* at 787. But the Sixth Circuit disagreed, explaining that railroads were plainly the intended recipients of the federal funds and, like direct recipients, were required to execute "an express promise to comply with the nondiscrimination regulations for federally assisted programs." *Id.* In this case, by contrast, the NCAA is plainly not the intended recipient of the federal aid paid to member institutions—earmarked for specific purposes other than the NCAA, such as student aid and scientific research. *Cf. Bentley* v. *Cleveland Cty. Bd. of Cty. Comm'rs*, 41 F.3d 600, 604 (10th Cir. 1994) (county's receipt of federal funds from state government triggered Section 504); *Dunlap* v. *Association of Bay Area Gov'ts*, 996 F. Supp. 962, 968 (N.D. Cal. 1998) ("An entity has been held to be an 'indirect recipient' only where that entity received funding that was funneled from the federal government through the state") (quoting *Paralyzed Veterans*, 477 U.S. at 609).

the acts of others absent allegations that the school itself engaged in acts of discrimination. Central to the court of appeals' ruling was its determination—based on an extensive review of the legislative record of Title IX—that "title IX makes funds available to a recipient in return for the *recipient's* adherence to the conditions of the grant," and that, as a result, "the spending conditions apply *only* to grant recipients." *Id.* at 1012-13 (emphasis added).[12] *See also Smith* v. *Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1018 (7th Cir. 1997) ("only a grant recipient can violate Title IX"), *cert. denied*, 66 U.S.L.W. 3814 (U.S. June 26, 1998).

These decisions are true to *Paralyzed Veterans'* contractual analysis governing the reach of Title IX, and stand on even firmer footing in light of this Court's decision last Term in *Gebser* v. *Lago Vista Independent School District*, 66 U.S.L.W. at 4502, 4505, holding that a school district receiving federal funds may not be held liable under Title IX's "contractual framework" for the misconduct of its employees unless it has "actual notice of, and

12 *Rowinsky* clarifies the Fifth Circuit position on the reach of the program-specific statutes in the wake of *Paralyzed Veterans*. In *Frazier* v. *Board of Trustees*, 765 F.2d 1278, 1289-90 (5th Cir. 1985) (emphasis in original), the court of appeals had held that a private contractor hired by a hospital receiving Medicaid and Medicare funds was covered by Section 504, where the contractor's "revenue was *in fact* linked to the hospital's receipt of [federal] funds," in that the contractor was required to "recompense [the hospital] in the event that 'third-party payors' disallowed any of the hospital's claims for reimbursement based on services rendered by [the contractor]." That ruling is dubious under *Paralyzed Veterans*, which was decided a year after *Frazier*. But even the *Frazier* court emphasized that "we do not hold that independent contractors who perform services for recipients of federal funds become recipients by virtue of a vicarious relationship through the primary recipient." *Id.* at 1290 n.29. In this case, there is no allegation that the NCAA's receipt of membership dues is in fact linked to its members' receipt of federal funds, and it is not. Instead, the allegations at most show the type of "vicarious relationship" held to be insufficient in *Frazier*.

is deliberately indifferent to, the * * * misconduct," and thus is effectively complicit in it. *See* note 6, *supra*. Applying these circuit decisions (and *Lago Vista*) here results in the conclusion that only colleges and universities that are in fact grant recipients are covered by Title IX—not the NCAA, which receives no federal aid and, accordingly, has never entered into the "contract between the Government and the recipient of funds" that is the central prerequisite for Title IX coverage to attach. *Lago Vista*, 66 U.S.L.W. at 4505.

Significantly, the Third Circuit decision also conflicts with *NCAA* v. *Califano*, 622 F.2d 1382 (10th Cir. 1980), on the particular issue of Title IX's application to the NCAA. That case involved a challenge brought by the NCAA to regulations promulgated under Title IX. The government moved to dismiss, arguing that the NCAA—not being a federal funding recipient—lacked standing to challenge the Title IX regulations. The district court agreed, explaining that the "administrative provisions in question exert no direct regulatory effect upon the NCAA" because the NCAA "receives no federal financial assistance," and the regulations—like the statute itself—"apply only to 'recipients' of federal financial assistance." 444 F. Supp. 425, 430-431 (D. Kan. 1978). The Tenth Circuit embraced that same view, reiterating that the Title IX "regulations can only be read to apply to the member colleges and *not to the NCAA itself*." 622 F.2d at 1387 (emphasis added). The Third Circuit below not only held that the NCAA *is* subject to Title IX, but did so in derogation of this Court's decision in *Paralyzed Veterans*, on the basis of the very Title IX regulations that the Tenth Circuit held were inapplicable to the NCAA.

Without coming to terms with the foregoing authorities, the Third Circuit sought to draw support for its ruling from *Horner* v. *Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994), which applied Title IX to a state high school athletic association. The athletic association in *Horner* was designated by state law as "'agent'" of the state board of education "'to manage interscholastic athletics at the high school level * * *,'" and the state board of education, in turn, exercised control over educational programs receiving hundreds of millions of dollars in federal funds. *Id.* at 268-269 (quoting state law). The athletic association also received dues from schools receiving federal funds. In holding that the association was subject to Title IX the Sixth Circuit pointed to the dues, but emphasized that "[t]he *most persuasive* evidence of the [association]'s status as a recipient is the fact that its functions are statutorily decreed to be those of the Board"—a federal funding recipient. *Id.* at 272 (emphasis added). As the District Court below held, in the absence of any comparable statutory connection between the NCAA and its members here—and there is none—*Horner* provides no justification for extending Title IX to the NCAA. *See* App. 33a.[13]

In any event, to the extent *Horner* supports Smith's Title IX claim it, too, goes beyond this Court's interpretation of the federal-funding trigger in *Paralyzed Veterans*, and simply underscores the conflict and confusion on the

---

[13] In following *Horner*, the Third Circuit stated that—while there is no statutory connection between the NCAA and its members—the NCAA nevertheless acts as a "surrogate[]" for its members. *Id.* 14a. That reflects a fundamental misunderstanding of the NCAA. While there is of course some overlap between the missions of the NCAA and its members, in adopting rules and regulations the NCAA acts foremost with *its* special mission in mind—"maintenance of [the] revered tradition of amateurism in college sports." *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. at 120. While apparently lost upon the Third Circuit, this fact was not lost upon the courts in *Califano* in concluding that the NCAA is not within Title IX's regulatory reach. *See Califano*, 444 F. Supp. at 433 ("[The NCAA] does not profess to represent its members' interests either in the promotion of intercollegiate athletic programs for women or in general physical education activities for members of either sex," and "[t]he NCAA's interests are * * * not coterminous with or identical to the broader interests of all or any of its institutional members.").

reach of Title IX to entities—including athletic associations—that do not themselves receive federal aid.

III. THE QUESTION PRESENTED IS IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

The multiple conflicts presented by this petition provide a compelling basis for plenary review, but the need for certiorari is heightened still further by the importance of the basic question presented: whether Title IX reaches private entities that do not themselves receive federal financial assistance, but receive payments from entities that do. This question is exceptionally important solely as it pertains to the NCAA, the organization charged with the "critical role" of regulating intercollegiate athletics in this country, a "revered tradition" of our national cultural heritage. *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. at 120. Indeed, in the Court of Appeals below nineteen separate amicus groups appeared solely to brief the important question "whether the [NCAA] * * * is subject to the requirements of [Title IX]." Amici Br. 1.

The Third Circuit ruling has immediate and serious practical implications for the NCAA. As those in Congress have recognized, "when we expand Federal jurisdiction under [the program-specific statutes], we expand the burdens accompanying them—paperwork, on-site compliance reviews, affirmative action requirements and much more." 134 Cong. Rec. S2396 (Mar. 17, 1988) (Sen Hatch); *see id.* at S2402 (Department of Justice letter listing administrative requirements).[14] More important, subjecting the NCAA to Title IX may impede the NCAA's efforts in fulfilling its vital mission. In this regard, Justice Powell's admonition in *Cannon* about the adverse effects of extending Title IX beyond its intended scope is apt here, too—"[a]rming frustrated applicants with the power to challenge in court his or her rejection inevitably will have a constraining effect on admissions programs," and impose upon institutions the "burden of expensive, vexatious litigation." 441 U.S. at 747 (dissenting). Requiring the NCAA to expend the time and resources necessary to defend against similar litigation by disgruntled student-athletes is especially inappropriate in light of the abundance of evidence—including this Court's interpretation in *Paralyzed Veterans*—that Congress never intended Title IX to apply to entities such as the NCAA that are not in fact recipients of federal funds.

But the implications of the Third Circuit decision are not limited to the NCAA. The court's indirect beneficiary analysis readily subjects countless other member organizations—national, state, and local—to claims that they, too, are subject to the program-specific statutes because these organizations, like the NCAA, receive dues or payments from members which, in turn, may receive federal funds. That is certainly true with respect to the scores of athletic associations and conferences (in addition to the NCAA), which operate at the high school and college levels throughout the country and receive dues or other payments from their member institutions. Moreover, the Third Circuit decision extends the program-specific statutes to virtually *any* individual or entity that receives nominal payments from—and, thus, under the Third Circuit rationale, "benefits from"—a college or university that, in turn, receives

[14] For example, the Title IX regulations require each recipient of federal financial assistance to designate an employee responsible for ensuring compliance with Title IX, and to notify students and employees of that individual's name, office address, and telephone number. 34 C.F.R. § 106.8. The NCAA has never designated such an employee, or been asked to do so. The regulations also impose upon recipients of federal financial assistance certain recordkeeping and reporting requirements, which the NCAA has never complied with, or been asked to comply with. *See id.* § 106.71 (incorporating by reference *id.* § 100.6). Regardless of whether Smith's Title IX claim has any merit (which it does not), the NCAA, which operates nationwide, now faces the prospect of having to comply with Title IX's regulatory regime simply due to the Third Circuit ruling in this case that it is covered by Title IX.

federal funds, all the way to the manufacturer of the basketball used to decide the intramural championship and the officials hired to referee the game. Once coverage is extended beyond the actual (or intended) recipients of federal aid there is simply no logical stopping point.[15]

In *Paralyzed Veterans* this Court conclusively rejected a similarly far-reaching interpretation of the identical federal-funding trigger at issue here, explaining that such an interpretation would give the program-specific statutes—including Title IX—"almost limitless coverage," a "result Congress surely did not intend." 477 U.S. at 608-609. This Court's subsequent decisions—including *Lago Vista* —only solidify that conclusion. The Court should grant certiorari to review the "almost limitless" interpretation of the federal-funding trigger adopted by the Court of Appeals below, extending Title IX to the private defendant in this case in direct conflict not only with the clear intent of Congress, but with this Court's decision in *Paralyzed Veterans*, as well as with the decisions of other federal circuits heeding the lesson of *Paralyzed Veterans*.

---

[15] The prospect of such claims is not far-fetched. In one recent case, for example, a high school student brought a Title IX claim against her teacher. It was undisputed that the high school did not itself receive federal funding, but the district to which it belonged did (and therefore was subject to Title IX). To establish coverage under Title IX, the plaintiff argued that, since the district employed a psychologist who worked at the high school, the high school was an indirect beneficiary of the federal aid received by the district, and thus subject to Title IX. *Buckley* v. *Archdiocese of Rockville Ctr.*, 992 F. Supp. 586, 588 (E.D.N.Y. 1998). Relying in part on the District Court decision in this case "that the NCAA's relationship to federal funding was too 'attenuated' to justify subjecting it to Title IX," the court in *Buckley* dismissed the Title IX claim. *Id.* at 589 (quoting App. 32a). The Third Circuit decision breathes new life into such indirect beneficiary claims.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ELSA KIRCHER COLE
General Counsel
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
6201 College Boulevard
Overland Park, KS 66211
(913) 339-1906

MARTIN MICHAELSON
JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5810

JOHN J. KITCHIN
ROBERT W. MCKINLEY
SWANSON, MIDGELEY, GAGWERE, KITCHIN & MCLARNEY
922 Walnut Street
Suite 1500
Kansas City, MO 64106
(816) 842-6100

* Counsel of Record

Counsel for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 97-3346, 97-3347

R.M. SMITH

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

RENEE M. SMITH,

Appellant.

Argued Feb. 12, 1998
Decided March 16, 1998

Before: GREENBERG, NYGAARD and McKEE, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

Renee M. Smith, a pro se litigant, appeals from the district court's order of May 21, 1997, dismissing her complaint for failure to state a claim, and from the district court's order of June 5, 1997, denying her motion for leave to amend her complaint. Smith's complaint alleges violations of section 1 of the Sherman Act, 15 U.S.C. § 1, and Title IX of the Educational Amendments of 1972, 20

U.S.C. § 1681, as well as a state law breach of contract claim against the National Collegiate Athletic Association ("NCAA"). Smith's allegations arise from NCAA's promulgation and enforcement of a bylaw prohibiting a student-athlete from participating in intercollegiate athletics while enrolled in a graduate program at an institution other than the student-athlete's undergraduate institution.

The district court had jurisdiction over the federal claims in this matter pursuant to 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. § 15, and over the state law claim pursuant to 28 U.S.C. § 1367. This court has jurisdiction to review the final orders of the district court pursuant to 28 U.S.C. § 1291.[1] We exercise plenary review over the district court's dismissal of Smith's complaint for failure to state a claim. *See Lake v. Arnold*, 112 F.3d at 682,

[1] According to the NCAA rules, a student-athlete is eligible to participate in intercollegiate athletics for a total of four seasons within a five-year period. Because Smith's five year-period of eligibility has expired and, according to the NCAA her complaint seeks only declaratory relief, the NCAA concludes that her Title IX claim is moot. We disagree.

Smith's Title IX claim is not moot although her period of eligibility has expired because she retains a claim for damages. *See Elis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 442, 104 S.Ct. 1883, 1889, 80 L.Ed.2d 428 (1984) (holding that a claim is not moot where there is a viable damages claim); *National Iranian Oil Co. v. Mapco Intern., Inc.*, 983 F.2d 485, 489 (3d Cir. 1992); *Jersey Cent. Power & Light Co. v. New Jersey*, 772 F.2d 35, 41 (3d Cir.1985). Although count II of Smith's complaint, which asserts a Title IX claim, states that "[t]his action is a request for a declaratory relief challenging sex discriminatory practices and policies of the NCAA . . . in violation of Title IX," her complaint also includes a clause which prays for additional relief including damages and any further relief which the court finds appropriate. App. at 5. In our view, a fair reading of the complaint establishes that it asserts an action for damages under Title IX. *See Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) (holding that a claim for damages exists in an action to enforce Title IX).

684 (3d Cir.1997). We accept all of her allegations as true, view them in the light most favorable to her, and will affirm the dismissal only if she can prove no set of facts entitling her to relief. *See Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir.1996); *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir.1994). We review the district court's denial of her motion for leave to amend her complaint for abuse of discretion. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir.1997).

II. FACTS AND PROCEDURAL HISTORY

Smith graduated from high school in the spring of 1991 and enrolled in St. Bonaventure University the following fall, where she participated in Division I athletics. Smith played intercollegiate volleyball for St. Bonaventure during the 1991-92 and 1992-93 athletic seasons. By her choice, Smith did not participate in intercollegiate volleyball for St. Bonaventure during the 1993-94 season.

Smith graduated from St. Bonaventure in two and one half years. Thereafter, she enrolled in a postbaccalaureate program at Hofstra University, and then in 1995 she enrolled in a second postbaccalaureate program at the University of Pittsburgh. St. Bonaventure did not offer either of these postbaccalaureate programs.

The NCAA is an unincorporated association comprised of public and private colleges and universities and is responsible for promulgating rules governing all aspects of intercollegiate athletics, including recruiting, eligibility of student-athletes, and academic standards. The member institutions agree to abide by and enforce these rules. The NCAA denied Smith eligibility to compete for Hofstra and the University of Pittsburgh in the 1994-95 and 1995-96 athletic seasons, respectively, based upon Bylaw 14.1.8.2 in the NCAA Manual (the "Postbaccalaureate Bylaw"). The Postbaccalaureate Bylaw provides that a student-athlete may not participate in intercollegiate ath-

letics at a postgraduate institution other than the institution from which the student earned her undergraduate degree.[2] Both Hofstra and the University of Pittsburgh applied to the NCAA for a waiver of the bylaw with respect to Smith, but the NCAA denied both requests. Smith was, however, in good academic standing and in compliance with all other NCAA eligibility requirements for the 1994-95 and 1995-96 athletic seasons.

In August 1996, Smith instituted this suit challenging the NCAA's enforcement of the bylaw as well as the NCAA's refusal to waive the bylaw in her case. More particularly, Smith alleged that the Postbaccalaureate Bylaw is an unreasonable restraint of trade in violation of section 1 of the Sherman Act and the NCAA's refusal to waive the bylaw excluded her from intercollegiate competition based upon her sex in violation of Title IX. Smith also asserted a state law breach of contract claim based upon the NCAA's denial of eligibility. On May 21, 1997, the district court dismissed Smith's federal claims for failure to state a claim upon which relief could be granted. The court held that the NCAA's refusal to waive the bylaw was not the type of action to which the Sherman Act applied. It also held that Smith's complaint did not

---

[2] The bylaw at issue provides that

> [a] student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period. . . .

Rule 14.1.8.2 of NCAA Manual.

allege adequately that the NCAA was a recipient of federal funding so as to be subject to Title IX. By the same order, the district court exercised its discretion to dismiss Smith's state law contract claim pursuant to 28 U.S.C. § 1367(c). *See Smith v. National Collegiate Athletic Ass'n*, 978 F.Supp. 213 (W.D.Pa.1997).

Thereafter, Smith submitted a proposed amended complaint and moved the district court for leave to amend her complaint, which the district court denied "as moot" on June 5, 1997. Smith filed timely appeals from these orders, which we have consolidated.

III. DISCUSSION

A. Sherman Act Claim

Count I of Smith's complaint alleges that the NCAA, in promulgating and enforcing the Postbaccalaureate Bylaw, violated section 1 of the Sherman Act because the bylaw unreasonably restrains trade and has an adverse anticompetitive effect. As we have indicated, the district court dismissed this claim for failure to state a claim upon which relief could be granted, holding that "the actions of the NCAA in refusing to waive the Postbaccalaureate Bylaw and allow the Plaintiff to participate in intercollegiate athletics is not the type of action to which the Sherman Act was meant to be applied." *See Smith*, 978 F.Supp. at 218. Smith argues that the district court erred in limiting the application of the Sherman Act to the NCAA's commercial and business activities. We disagree.

Section 1 of the Sherman Act provides, in relevant part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Although the section literally prohibits "every" contract, section 1 does not preclude all restraints on trade, but only those

that are unreasonable. *See National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 & n.17, 104 S.Ct. 2948, 2959 & n. 17, 82 L.Ed.2d 70 (1984); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 342-44, 102 S.Ct. 2466, 2472-73, 73 L.Ed.2d 48 (1982). The Clayton Act, 15 U.S.C. §§ 15, 26, grants a private right of action to, *inter alia*, a person "injured in his business or property" by a violation of section 1 of the Sherman Act.[3]

Smith misconstrues the law in arguing that the Supreme Court has refused to limit antitrust remedies to commercial interests. The cases she cites address whether the plaintiffs alleged injuries within the meaning of the Clayton Act; in that context, the Court held that the statute was not limited to redressing injuries to commercial interests. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39, 99 S.Ct. 2326, 2330-31, 60 L.Ed.2d 931 (1979) (holding that "injury to business or property" was not limited to commercial interests); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 473, 102 S.Ct. 2540, 2545, 73 L.Ed.2d 149 (1982) (holding that a subscriber to a health plan who had employed the services of a psychologist alleged a redressable antitrust injury); *see also McNulty v. Borden, Inc.*, 474 F.Supp. 1111, 1115-18 (E.D.Pa.1979) (holding that an employee of an alleged antitrust violator was injured in his business or property). The question which we now face is different; it is whether antitrust laws apply only to the alleged infringer's commercial activities. Thus,

---

[3] Section 4 of the Clayton Act provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15.

rather than focus on Smith's alleged injuries, we consider the character of the NCAA's activities.

In this regard, we recognize that the Supreme Court has suggested that antitrust laws are limited in their application to commercial and business endeavors. Thus, the Court has explained that

> [the Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought (by these laws) was the prevention of the restraints to the competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93, 60 S.Ct. 982, 992, 84 L.Ed. 1311 (1940). The Court also has noted that "in *Apex* [it] recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n. 7, 79 S.Ct. 705, 710 n. 7, 3 L.Ed.2d 741 (1959).

The Supreme Court addressed the applicability of the Sherman Act to the NCAA in *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70, holding that the NCAA's plan to restrict television coverage of intercollegiate football games violated section 1. The Court discussed the procompetitive nature of the NCAA's activities such as establishing eligibility requirements as opposed to the anticompetitive

nature of the television plan. *See id.* at 117, 104 S.Ct. at 2969. Yet, while the Court distinguished the NCAA's television plan from its rule making, it did not comment directly on whether the Sherman Act would apply to the latter.

Although insofar as we are aware no court of appeals expressly has addressed the issue of whether antitrust laws apply to the NCAA's promulgation of eligibility rules, *cf. McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338, 1343 (5th Cir.1988) (assuming without deciding that the NCAA's eligibility rules were subject to antitrust scrutiny and holding that the "no-draft" and "no-agent" rules do not have an anticompetitive effect), many district courts have held that the Sherman Act does not apply to the NCAA's promulgation and enforcement of eligibility requirements. *See Gaines v. National Collegiate Athletic Ass'n*, 746 F.Supp. 738, 744-46 (M.D.Tenn. 1990) (holding that antitrust law cannot be used to invalidate NCAA eligibility rules, but noting in dicta that the "no-agent" and "no-draft" rules have primarily procompetitive effects); *Jones v. National Collegiate Athletic Ass'n*, 392 F.Supp. 295, 303 (D.Mass.1975) (holding that antitrust law does not apply to NCAA eligibility rules); *College Athletic Placement Service, Inc. v. National Collegiate Athletic Ass'n*, 1975-1 Trade Cas. (CCH) ¶ 60,117, *available in* 1974 WL 998, *2, *3 (D.N.J. 1974) (holding that the NCAA's adoption of a rule furthering its noncommercial objectives, such as preserving the educational standards of its members, is not within the purview of antitrust law), *aff'd*, 506 F.2d 1050 (3d Cir. 1974) (table).

We agree with these courts that the eligibility rules are not related to the NCAA's commercial or business activities. Rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek

to ensure fair competition in intercollegiate athletics. Based upon the Supreme Court's recognition that the Sherman Act primarily was intended to prevent unreasonable restraints in "business and commercial transactions," *Apex*, 310 U.S. at 493, 60 S.Ct. at 992, and therefore has only limited applicability to organizations which have principally noncommercial objectives, *see Klor's, Inc.*, 359 U.S. at 214 n. 7, 79 S.Ct. at 710 n. 7, we find that the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements.[4]

Moreover, even if the NCAA's actions in establishing eligibility requirements were subject to the Sherman Act, we would affirm the district court's dismissal of this claim. The NCAA's eligibility requirements are not "plainly anticompetitive," *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978), and therefore are not per se unreasonable, *see National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. at 101, 104 S.Ct. at 2960 (refusing to apply per se rule to NCAA's television plan because the NCAA is involved in an industry where horizontal re-

[4] The recent decision of the Court of Appeals for the Tenth Circuit in *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir.1998), does not alter our result. At issue in *Law* was the NCAA's bylaw restricting entry-level coaches' annual compensation. The court held that although the restriction was a horizontal price restraint, which is usually per se invalid, the rule of reason applied because certain products, such as intercollegiate sports, require horizontal restraints in order to exist. *See id.* at 1017 (citing *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. at 100-01, 104 S.Ct. at 2959-60).

The bylaw at issue in *Law* concerned a restriction on the business activities of the institutions, whereas the Postbaccalaureate Bylaw does not. Because our analysis regarding the applicability of the Sherman Act focuses on the distinction between commercial and noncommercial activities, *Law* is inapposite. Further, because of the significant difference in the nature of the bylaw at issue in *Law* and the Postbaccalaureate Bylaw, the *Law* court's rule of reason analysis is not instructive here.

straints are necessary to the availability of the product); *McCormack*, 845 F.2d at 1343-44; *College Athletic Placement Service*, 1975-1 Trade Cas. (CCH) ¶ 60,117, *available in* 1974 WL 998, *3. Consequently, if the eligibility requirements were subject to the Sherman Act, we would analyze them under the rule of reason.

Under the "rule of reason" test, a court considers all relevant factors in determining a defendant's purpose in implementing the challenged restraint and the effect of the restraint on competition, *see Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367-68 (3d Cir.1996) (citing *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 243-44, 62 L.Ed. 683 (1918)), and asks essentially whether the challenged rule promotes or hinders competition. *See McCormack*, 845 F.2d at 1344.

As noted above, the Supreme Court has recognized the procompetitive nature of many of the NCAA's restraints, including eligibility requirements. *See National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. at 117, 104 S.Ct. at 2969. According to the Supreme Court,

> [w]hat the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules . . . must be agreed upon, and all restrain the manner in which institutions compete. . . . Thus, the NCAA plays a vital role in enabling [intercollegiate sports] to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice . . . and hence can be viewed as procompetitive.

Id. at 101-02, 104 S.Ct. at 2960-61 (footnote omitted). In particular, the Court explained that "[i]t is reasonable

to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics" and suggested that rules establishing eligibility requirements of student-athletes were such controls, while rules limiting television broadcasts were not. *See id.* at 117, 104 S.Ct. at 2969.

While the parties have not cited any opinion addressing the particular bylaw at issue here, and we have found none, other courts have held that the NCAA's "no-draft" and "no-agent" rules, which disqualify a student-athlete from further intercollegiate competition if the student-athlete enters a professional draft or contacts an agent, are reasonable because they are procompetitive. *See McCormack*, 845 F.2d at 1343; *Banks v. National Collegiate Athletic Ass'n*, 977 F.2d 1081, 1087-94 (7th Cir.1992) (holding that NCAA's "no-draft" and "no-agent" rules do not have an anticompetitive impact on a discernable market); *Gaines*, 746 F.Supp. at 746; *Jones*, 392 F.Supp. at 304 (noting in dicta that "any limitation on access to intercollegiate sports is merely the incidental result of the organization's pursuit of its legitimate goals"); *see also Justice v. National Collegiate Athletic Ass'n*, 577 F.Supp. 356, 379 (D.Ariz.1983) (holding that NCAA sanctions such as rendering a college team ineligible for post-season play and for television appearances imposed for violations of rule against providing compensation to student-athletes did not violate antitrust law because sanctions were reasonably related to the NCAA's goals of preserving amateurism and promoting fair competition).

We agree with these courts that, in general, the NCAA's eligibility rules allow for the survival of the product, amateur sports, and allow for an even playing field. *See McCormack*, 845 F.2d at 1345. Likewise, the bylaw at issue here is a reasonable restraint which furthers the

NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive. Clearly, the rule discourages institutions with graduate or professional schools from inducing undergraduates at other institutions to forgo participating in the athletic programs at their undergraduate institutions in order to preserve eligibility to participate in intercollegiate athletics on a post-baccalaureate basis. Likewise, the rule discourages undergraduates from forgoing participation in athletic programs on their own initiative to preserve eligibility on a post-baccalaureate basis at another institution. Indeed, we think that the bylaw so clearly survives a rule of reason analysis that we do not hesitate upholding it by affirming an order granting a motion to dismiss Smith's antitrust count for failure to state a claim on which relief can be granted.

B. Title IX Claim

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Intercollegiate athletics is an educational program or activity within the statute. *See* 20 U.S.C. § 1687; 34 C.F.R. § 106.41(a).[5] Thus, the NCAA is subject to Title IX pro-

[5] The statute defines "program or activity" as

> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or . . .
>
> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance. . . .

20 U.S.C. § 1687. In addition, federal regulation in part provides that

> [n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a).

vided that it receives federal financial assistance within the meaning of section 1681(a).

Federal regulations define "recipient" as including

> any public or private agency, institution or organization, or other entity, or any other person, *to whom Federal financial assistance is extended directly or through another recipient* and which operates an educational program or activity *which receives or benefits* from such assistance, including any subunit, successor, assignee or transferee thereof.

34 C.F.R. § 106.2(h) (1997) (emphasis added). The plain language of the statute and regulation is quite broad and encompasses indirect recipients of federal funds. *See Grove City College v. Bell*, 465 U.S. 555, 564, 104 S.Ct. 1211, 1216, 79 L.Ed.2d 516 (1984) (holding that a college received federal funds where the funds were granted to its students as financial aid rather than directly to the college because the language of the section does not distinguish between direct and indirect receipt of federal funds).

The Court of Appeals for the Sixth Circuit addressed the applicability of Title IX to a state high school athletic association in *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir.1994). In *Horner*, the plaintiffs, female student-athletes, alleged that the association received dues from its member high schools, many of which receive federal funds, and that a state statute authorized the designation of the association as an agent of the state board of education. *See* Ky.Rev.Stat. Ann. § 156.070(1), (2). In that capacity, the association performed the board's statutory duties with respect to inter-

scholastic sports. The plaintiffs alleged that the association violated Title IX by sanctioning fewer sports for girls than boys and by refusing to sanction a particular sport for girls. The court held that the association would be subject to Title IX if the plaintiff could prove her allegations with respect to its functioning and financing. *See id.*

The district court attempted to distinguish *Horner* by noting that "even if the [NCAA] receives dues from member schools which receive federal funds, unlike the situation in Horner, there is no statutory connection between the parties such that the Defendant can be considered the 'agent' of its member institutions that receive federal financial assistance." *See Smith*, 978 F.Supp. at 220. Thus, according to the district court, the distinguishing characteristic here is the lack of statutory authority for the NCAA. We disagree. The NCAA acts no less than the association in *Horner* as an agent of its member institutions merely because it lacks statutory authority for its activities. The NCAA is a voluntary organization created by and comprised of the educational institutions which essentially acts as their surrogate with respect to athletic rules.

In its construction of section 504 of the Rehabilitation Act, which contains language identical to that of Title IX in 20 U.S.C. § 1681(a) regarding receipt of federal assistance,[6] the Supreme Court has indicated that Congress, as in Title IX, did not distinguish between direct and indirect financial assistance. *See United States Dep't of Transp. v.*

[6] The Rehabilitation Act states that

> [n]o otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving Federal financial assistance.*

29 U.S.C. § 794 (emphasis added).

Paralyzed Veterans of America, 477 U.S. 597, 606-07, 106 S.Ct. 2705, 2711-12, 91 L.Ed.2d 494 (1986) (citing *Grove City College*, 465 U.S. at 564, 104 S.Ct. at 1216 (holding that a college received federal funds where the funds were granted to its students as financial aid rather than directly to the college)). The Court, however, drew a distinction between those entities which indirectly *benefit from* federal assistance and those that indirectly *receive* federal assistance, holding that only those the *receive* federal funds are within the statute. Thus, the Court rejected the argument that all commercial airlines are "recipients" of federal funds simply because airport operators receive federal funds which benefit the airlines in the form of runways, *inter alia*. *See id.* at 606, 106 S.Ct. at 2711. The Court defined "recipient" from a contractual perspective, limiting "recipients" of federal funds, and therefore the obligations of the act, to those who are in a position to decide whether to "receive" federal funds and thereby accept the concomitant obligations of the statute. *See id.*[7]

Notwithstanding the parallel language of the Rehabilitation Act and Title IX, we do not apply the *Paralyzed Veterans* Court's definition of "recipient" to Title IX in the circumstances here. In our view, the broad regulatory language under Title IX, which defines a recipient as an entity "which operates an educational program or activity which *receives or benefits*" from federal funds, 34 C.F.R. § 106.2(h) (1997) (emphasis added), requires that we reach a different result. Application of *Paralyzed Veter-*

[7] The Court noted that "Congress enters into an arrangement in the nature of a contract with the recipients of the [federal] funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision." 477 U.S. at 605, 106 S.Ct. at 2711. The Court further noted that "[b]y limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds." *Id.* at 606, 106 S.Ct. at 2711.

ans here would render the regulatory definition of "recipient" under Title IX a nullity. After all, unlike the commercial airlines in *Paralyzed Veterans*, the NCAA is not merely an incidental beneficiary of federal funds. Quite to the contrary, it seems to us that the relationship between the members of the NCAA and the organization itself is qualitatively different than that between airlines and airport operators, for we think that it would be unreasonable to characterize the latter as surrogates for the airlines. Given the breadth of the language of the Title IX regulation defining recipient, we hold that allegations in Smith's proposed amended complaint, that the NCAA receives dues from its members which receive federal funds, if proven, would subject the NCAA to the requirements of Title IX.

The district court found that Smith's original complaint did not allege that the NCAA was a recipient of federal funds, and therefore dismissed the Title IX claim. *See Smith*, 978 F.Supp. at 219. Smith's complaint included the following allegation:

> This action is a request for declaratory relief challenging sex discriminatory practices and policies of the NCAA, Hofstra University, and the University of Pittsburgh in violation of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681. Title IX prohibits sex discrimination in an educational program or activity receiving federal financial assistance.

Compl. ¶ 25. We agree that Smith's original complaint did not contain an allegation that the NCAA receives federal financial assistance. Thus, the district court properly dismissed her original Title IX complaint.[8]

---

[8] However, Judge McKee would hold that Smith's original complaint sufficiently states that the NCAA receives federal financial assistance under the pleading requirements that we apply to pro se complaints. *See Zilich v. Lucht*, 981 F.2d 694 (3d Cir.1992) ("When, as in this case, plaintiff is a pro se litigant, we have a special obligation to construe [her] complaint liberally.").

But we have not confined our analysis to Smith's original complaint for, as we have indicated, following the district court's dismissal of her claims, Smith moved for leave to amend her complaint pursuant to Fed.R.Civ.P. 15. By order dated June 5, 1997, the district court denied this motion, stating only that the motion "is denied as moot, the court having granted defendant's motion to dismiss on May 20, 1997." App. at 117. Because the district court gave no further explanation, it is unclear whether the district court was unaware of its discretion to allow the proposed amended complaint despite the dismissal or whether the court believed that the amendment would be futile even if pleaded. Nevertheless, under either view, the district court erred in denying Smith's motion for leave to amend.

Pursuant to Fed.R.Civ.P. 15(a), a plaintiff has an absolute right to amend her complaint once at any time before a responsive pleading is served. Thereafter, a plaintiff must seek leave of the district court to amend her pleading, and although it is within the district court's discretion, district courts should grant such requests freely when justice so requires. *Id.*

After the district court enters judgment on a motion to dismiss, a plaintiff no longer may amend her complaint as of right. *See Newark Branch, NAACP v. Town of Harrison*, 907 F.2d 1408, 1417 (3d Cir.1990); *Kauffman v. Moss*, 420 F.2d 1270, 1276 (3d Cir.1970). However, even though Smith no longer was entitled to amend her complaint as of right after the dismissal of her claim, it was within the district court's discretion to grant her leave to amend. *See Newark Branch, NAACP*, 907 F.2d at 1417; *Kauffman*, 420 F.2d at 1276; *In re Sverica Acquisition Corp.*, 179 B.R. 457, 459 (Bkrtcy. E.D.Pa.1995); *Fearon v. Community Fed. Sav. & Loan of Phila.*, 119 F.R.D. 13, 15 (E.D.Pa.1988) (plaintiff had no right to amend where both complaint and action dismissed, but could seek leave of court to do so). Thus, her motion to

amend was not moot in the sense of being too late or being foreclosed by the dismissal.

While "the grant or denial of an opportunity to amend is within the discretion of the District Court . . . outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of that discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). On the other hand, a district court justifiably may deny leave to amend on grounds such as undue delay, bad faith, dilatory motive, and prejudice, as well as on the ground that an amendment would be futile. *See id.; In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1434; *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir.1983). An amendment is futile if the complaint, as amended, would not survive a motion to dismiss for failure to state a claim upon which relief could be granted. *See In re Burlington Coat Factory*, 114 F.3d at 1434 (citing *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir.1996)). In determining whether the amendment would be futile, the district court applies the same standard of legal sufficiency as under Fed.R. Civ.P. 12(b)(6). *See id.*

Smith alleged facts in her proposed amended complaint which, if proven, would establish that the NCAA was a recipient of federal funds within the meaning of Title IX. Her motion states that she intended the amended complaint to cure any allegational defects, and the proposed amended complaint includes an allegation that the NCAA is an indirect recipient of federal funds. In particular, her proposed amended complaint alleges that "[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." App. at

98. This allegation plainly alleges that the NCAA receives dues from member institutions, which receive federal funds. As discussed above, this allegation would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss.

If a district court concludes that an amendment is futile based upon its erroneous view of the law, it abuses its discretion in denying a plaintiff leave to amend to include a legally sufficient allegation. *See Centifanti v. Nix*, 865 F.2d 1422, 1431 (3d Cir.1989) (holding that the district court, which erred in its conclusion that there was jurisdictional defect, abused its discretion in denying a plaintiff's motion for leave to amend his complaint because the proposed amendment would not cure the jurisdictional defect). Thus, if the district court denied Smith leave to amend because it viewed the proposed amendments as futile, it erred because the conclusion was based on an error of law. Furthermore, we see no basis to conclude that the district court justifiably could have denied the motion to amend on the grounds that Smith had acted in bad faith, with a dilatory motive, or had delayed unduly in bringing the motion or that granting the motion would prejudice the NCAA. Indeed, there is nothing in the record to support a conclusion that the district court denied the motion to amend on any of these grounds. Overall, therefore, we are satisfied that the district court abused its discretion in denying the motion to amend the complaint.[9]

---

[9] We do not imply that we have any view of the merits of Smith's Title IX claim. The parties have not briefed the merits, and the district court will address those issues on remand if Smith can prove her allegations to support the applicability of Title IX to the NCAA. Thus, we emphasize that we merely hold that the amendment would not have been futile in the sense that it would not have pled adequately that the NCAA was subject to Title IX.

IV. CONCLUSION

For the foregoing reasons, we will affirm the district court's dismissal of appellant's Sherman Act claim, vacate its dismissal of the Title IX claim, and reverse the district court's denial of her motion for leave to amend her complaint with respect to her Title IX claim. In light of this conclusion, we will remand to the district court for further proceedings consistent with this opinion and direct the district court to reinstate her state law contract claim, over which the district court declined to exercise jurisdiction pursuant to 28 U.S.C. § 1367(c). The parties will bear their own costs on this appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. PENNSYLVANIA

Civil Action No. 96-1604

R. M. SMITH,
Plaintiff,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant.

May 21, 1997

OPINION AND ORDER OF COURT

AMBROSE, District Judge.

Pending before the Court is the Motion to Dismiss the Defendant, the National Collegiate Athletic Association ("NCAA"), to dismiss the complaint filed *pro* se by the Plaintiff, R.M. Smith ("Plaintiff" or "Smith") pursuant to Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 12(b)(6). Plaintiff is alleging violation of section 1 of the Sherman Act, 15 U.S.C. § 1 and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, as well as alleging a state law claim for breach of contract. For the reasons set forth below, Defendant NCAA's Motion to Dismiss will be granted.

STANDARD OF REVIEW

In deciding a motion to dismiss, all factual allegation and all reasonable inferences therefrom must be accepted

as true and viewed in the light most favorable to the plaintiff. *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir.1988). A court may dismiss a plaintiff's complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). In ruling on a motion to dismiss for failure to state a claim, the court looks to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Colburn*, 838 F.2d at 666. Further, courts construe *pro se* complaints, such as the ones *sub judice*, more liberally than complaints drafted by lawyers and grant dismissal of *pro se* complaints only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972).

FACTS

The Plaintiff has alleged the following in her Complaint which, for purposes of this motion to dismiss I will accept as true. Plaintiff graduated from high school in 1991, became a member of the intercollegiate volleyball team at St. Bonaventure University in the fall of 1991 and played volleyball at St. Bonaventure during the 1991-92 and 1992-93 athletic seasons. As a student-athlete, Plaintiff participated in intercollegiate events in multiple states within the United States. While participating in these intercollegiate events throughout the United States, Plaintiff as a student-athlete received awards, benefits and expenses permitted under Article 16 of the NCAA Manual. Plaintiff did not, at her own election, participate in an intercollegiate sport at St. Bonaventure during the 1993-94 athletic season.

After graduating from St. Bonaventure, Plaintiff entered a Postbaccalaureate Program at Hofstra University, where

Defendant NCAA denied eligibility to Plaintiff to participate in intercollegiate athletics during the 1994-95 athletic season. In 1995, Plaintiff entered into a second Postbaccalaureate Program at the University of Pittsburgh and again was denied eligibility by Defendant NCAA to play intercollegiate volleyball. Neither of the Postbaccalaureate programs entered into by Plaintiff were offered at St. Bonaventure, Plaintiff's undergraduate institution.

The basis for Defendant's denial to Plaintiff of eligibility to play intercollegiate sports during the 1994-95 and 1995-96 athletic seasons was its Postbaccalaureate Bylaw. The Postbaccalaureate Bylaw is enumerated as Bylaw 14.1.8.2 in the 1993-94 NCAA Manual and prohibits a student-athlete from participating in intercollegiate athletics at a post-graduate institution other than the one from which his or her undergraduate degree was obtained. Plaintiff otherwise was in good academic standing and in compliance wth all other requirements to participate in intercollegiate athletics during the 1994-95 and 1995-96 athletic seasons. Both Hofstra University and the University of Pittsburgh appealed to the NCAA to waive the Postbaccalaureate Bylaw for Plaintiff but Defendant refused to waive the Bylaw with respect to Plaintiff and therefore, Plaintiff was denied athletic eligibility during the 1994-95 and 1995-96 athletic seasons.

Graduates from two-year colleges are eligible to compete at other Division I institutions.

LEGAL ANALYSIS

I. *Plaintiff's Sherman Act Claim.*

At issue with respect to Plaintiff's Sherman Act claim is the Defendant's Postbaccalaureate Bylaw, which is enumerated as Bylaw 14.1.8.2 in the 1993-94 NCAA Manual and which prohibits a student-athlete from participating in intercollegiate athletics at a postgraduate institution other than the one from which his or her undergraduate degree

was obtained. Plaintiff has alleged in her Complaint that: (1) Defendant violated § 1 of the Sherman Act in that it engaged in a contract, combination, and conspiracy to place unlawful restraints upon the trade and commerce of intercollegiate athletics between the several states; (2) the creation and enforcement of Bylaws in the NCAA Manual are joint actions by the NCAA and its member institutions, including Hofstra University and the University of Pittsburgh; (3) the Defendant and member institutions contract, combine, and conspire to enforce the Bylaws in the NCAA Manual; (4) intercollegiate athletics are activities in or substantially affect interstate commerce; (5) Defendant denied Plaintiff intercollegiate athletic eligibility during the 1994-95 and 1995-96 athletic seasons; (6) the NCAA's decision to deny Plaintiff athletic eligibility was solely based upon the Postbaccalaureate Bylaw, found at Bylaw 14.1.8.2 of the 1993-94 NCAA Manual; (7) Hofstra University and the University of Pittsburgh both appealed to the Defendant to waive the Postbaccalaureate Bylaw for Plaintiff but the Defendant refused; (8) as a direct result of the NCAA's refusal to waive the Postbaccalaureate Bylaw, Plaintiff was denied athletic eligibility during the 1994-95 and 1995-96 athletic seasons; (9) by an unreasonable restraint of trade, Plaintiff was injured in her business and property by not being permitted to participate in intercollegiate athletics at Hofstra University and the University of Pittsburgh during the 1994-95 and 1995-96 athletic seasons; (10) the Defendant's enforcement of the Postbaccalaureate Bylaw has an adverse anticompetitive effect, impairs and destroys competition and is unreasonable; and (11) enforcement of the Postbaccalaureate Bylaw cannot be justified by the NCAA especially when graduates from two-year colleges are eligible to compete at other Division I institutions. Complaint, ¶¶ 9-19.

Defendant first argues that Count I of Plaintiff's Complaint, which alleges that Defendant violated § 1 of the Sherman Act, must be dismissed for failure to state a claim

upon which relief can be granted. Specifically, Defendant asserts that said claim must be dismissed because "[t]he alleged unlawful activities are not of a 'commercial' nature and therefore do not fall within the purview of the Sherman Act," or alternatively, if the Sherman Act is applicable to the facts as alleged by Plaintiff, because "the enforcement of the NCAA Bylaws are reasonable, and therefore lawful, as a matter of law." Defendant's Motion to Dismiss, ¶¶ 6-7. Thus, the threshold inquiry is whether or not the Sherman Act is even applicable to the instant claim by Plaintiff.

Section 1 of the Sherman Act states in pertinent part: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal[.]" 15 U.S.C. § 1. As explained by the United States Supreme Court in *Apex Hosiery Co. v. Leader et al.*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940):

> [The Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought (by these laws) was the prevention of the restraints to the competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Id. at 472-73, 60 S.Ct. at 985. The Court has further noted that "[t]he Court in *Apex* recognized that the [Sherman] Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other

objectives." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 214 n. 7, 79 S.Ct. 705, 710 n. 7, 3 L.Ed.2d 741 (1959). Plaintiff claims that Defendant violated § 1 of the Sherman Act in that through its Postbaccalaureate Bylaw, it "engaged, combined and conspired to place unlawful restraints upon the trade and commerce of intercollegiate athletics between the several states." Complaint, ¶ 9.

While the question of whether the Sherman Act reaches the actions of the NCAA when, through the Postbaccalaureate Bylaw, it sets eligibility standards for postgraduate student-athletes in intercollegiate athletics, has never been addressed by the federal courts, the courts have examined the applicabilty of the Sherman Act in relation to other NCAA rules, regulations and plans. Thus, in *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), the United States Supreme Court held that an NCAA plan that restricted the televising of the games of NCAA member institutions violated § 1 of the Sherman Act because it constituted a restraint upon the operation of a free market. To the contrary, in *Jones v. National Collegiate Athletic Association*, 392 F.Supp. 295 (D.Ma. 1975) and *Gaines v. National Collegiate Athletic Association*, 746 F.Supp. 738 (M.D.Tn.1990), district courts held that the Sherman Act does not reach the actions of the NCAA in setting eligibility standards where NCAA eligibility rules barred student-athletes at their member institutions from participating in intercollegiate sports after (1) a student-athlete had played multiple seasons with various "amateur" teams, receiving compensation therefore (*Jones*) and (2) a student-athlete had entered the National Football League draft (*Gaines*).[1] Notably, in so holding, the *Jones* court explained:

---

[1] Like Plaintiff in the case *sub judice*, the plaintiff in *Jones* had alleged that his exclusion from participation in college sports reduced competition and thereby violated § 1 of the Sherman Act. In *Gaines*, the plaintiff argued that the defendants, by preventing college football players like himself from returning to college play for which they are otherwise eligible after an unsuccessful bid in the NFL draft, engaged in an unlawful exercise of monopoly power in violation of § 2 of the Sherman Act.

> [t]he plaintiff is currently a student, not a businessman in the traditional sense, and certainly not a 'competitor' within the contemplation of the antitrust laws. The 'competition' which the plaintiff seeks to protect does not originate in the marketplace or as a sector of the economy but in the hockey rink as part of the educational program of a major university. And, of equal significance, plaintiff has so far not shown how the action of the N.C.A.A. in setting eligibility guidelines has any nexus to commercial or business activities in which the defendant might engage.

Id. at 303. Similarly, in *College Athletic Placement Service, Inc. v. National Collegiate Athletic Association*, 1974 WL 998, (D.N.J. August 22, 1974), *aff'd*, 506 F.2d 1050 (3d Cir.1974), the United States District Court for the District of New Jersey held that "[t]he NCAA's action in ratifying an amendment to its Constitution for the purpose of preserving educational standards in its member institutions does not come within the purview of the Sherman Act." *Id.* at *4. In *College Athletic Placement Service, Inc.*, the provision at issue forbade eligibility to student-athletes who agreed or had agreed to be represented by an agent or other marketing organization. Additionally, the United States Supreme Court has stated with respect to NCAA regulations and the Sherman Act that "[t]he specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, *the eligibility of participants*, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." *Board of Regents*, 468 U.S. at 117, 104 S.Ct. at 2969 (emphasis added). *But see Banks v. NCAA*, 746 F.Supp. 850, 857 (N.D.Ind.1990) ("[t]he

Supreme Court cited *Jones* with apparent approval in *NCAA v. Board of Regents*, 4[68] U.S. at 102, n. 24, 104 S.Ct. at 2961 n. 24. Nonetheless, after a careful reading of *NCAA v. Board of Regents*, this court is unwilling to rely on a single district court opinion [*Jones*] for the conclusion, sought by the NCAA, that the antitrust laws have no application to NCAA regulations concerning eligibility.").

Thus, based upon a reading of the relevant case law, it is clear that the Sherman Act is applicable to the NCAA with respect to those actions of the Defendant that are related to its commercial or business activities, but only to those such activities. *See also Justice v. National Collegiate Athletic Association*, 577 F.Supp. 356, 383 (D.Ariz. 1983) ("[i]n sum, it is clear that the NCAA is now engaged in two distinct kinds of rulemaking activity. One type . . . is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose.").

Having so found, after careful consideration of the submissions of the parties and the case law on this issue, I can only conclude that the actions of the NCAA in refusing to waive the Postbaccalaureate Bylaw and allow the Plaintiff to participate in intercollegiate athletics is not the type of action to which the Sherman Act was meant to be applied. In other words, there is simply no logical way to conclude (through enforcement of the Postbaccalaureate Bylaw) that the NCAA is attempting to provide itself and its member institutions with a commercial advantage or that the result of the implementation of the Postbaccalaureate Bylaw is to provide the NCAA and its member institutions with any commercial advantage. Accordingly, Defendant's Motion to Dismiss Count I of Plaintiff's Complaint is granted for failure to state a claim upon which relief can be granted and Count I of Plaintiff's Complaint is dismissed.

II. *Plaintiff's Title IX Claim.*

Count II of Plaintiff's claim alleges that Defendant has violated Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, in that it has granted a disproportionate number of waivers of its Bylaws to male student-athletes. Defendant moves to dismiss this claim on the basis that (1) Plaintiff has failed to allege that Defendant is a recipient of federal financial assistance and (2) Plaintiff cannot establish that it is a recipient of federal financial assistance which would render it subject to Title IX.[2]

In response, Plaintiff does not address Defendant's first argument, that she failed to plead that Defendant is a recipient of federal funding. Rather, Plaintiff focuses upon the second argument raised by Defendant, namely that Plaintiff cannot establish that Defendant is a recipient of federal funding. Specifically, Plaintiff argues that:

> in the instant case, the NCAA enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity. Further, the defendant benefits greatly when students receive financial aid. If such funds were not available, student-athletes might not otherwise be financially able to participate in athletic programs due to the student-athletes's income limitations. Possibly, financial aid may be premised on the participation in intercollegiate athletics, especially when the NCAA Manual places limitations and regulations on the receipt of

[2] Defendant also argues that Plaintiff can offer no facts to support her conclusory allegation that the NCAA has engaged in sexual discrimination by granting more waivers of its Postbaccalaureate Bylaws to male student-athletes than female student athletes. This basis for dismissal of Count II is not, however, pled in its motion to dismiss and therefore, will not be considered in addressing Defendant's motion to dismiss. Further, I also note that in deciding Defendant's motion to dismiss Plaintiff's Title IX claim, I have not considered any of the extraneous documentation attached to Defendant's motion to dismiss.

> federal financial aid for student-athletes. Further, although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees.

Plaintiff's Opposition Brief, p. 6. Plaintiff further argues on this point that "[a]s a matter of public policy, this Court should subject NCAA actions regarding the operation of educational institutions to Title IX scrutiny." *Id.*

Defendant, in its Reply Brief in Support of Motion to Dismiss ("Defendant's Reply Brief") counters Plaintiff's contentions by arguing:

> [while] Plaintiff argues the NCAA indirectly receives federal aid by passing rules which govern the operation of intercollegiate athletics, she does not allege the NCAA receives federal funds to administer its programs or that the NCAA administers any federal funds in adopting rules which govern the operation of intercollegiate athletic events. Plaintiff simply strains an argument by attempting to stretch the definition of "recipient" to include the NCAA because its rules affect students who may receive federal aid and also participate in intercollegiate athletics. There simply is no legal basis to extend the definition beyond the purpose of Title IX, which is to prevent the use of federal resources to support gender discrimination in connection with these programs.
>
> * * * *
>
> Because Plaintiff does not claim the NCAA administers federal funds in any way, she cannot show the NCAA used federal funds to promote or support gender discrimination.

Defendant's Reply Brief, pp. 3-4.

Title IX states: "[n]o person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination

under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Thus, Title IX prohibits sex discrimination under any education program or activity receiving federal funds. "Recipient" is defined as:

> any state or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution or organization, or other party, or any other person, to whom Federal financial assistance is extended directly or through another recipient and which operates an educational program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee thereof.

34 C.F.R. § 106.2(h) (1997). As explained in *Favia v. Indiana University of Pennsylvania*, 812 F.Supp. 578 (W.D.Pa.) *aff'd*, 7 F.3d 332 (3d Cir.1993), Title IX "was intended to prevent the use of federal resources to support gender discrimination." *Id.* at 584, *citing*, *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

Addressing first Defendant's argument that Plaintiff's Title IX claim must be dismissed because of Plaintiff's failure to allege that the NCAA is a recipient of federal funds, although Plaintiff is appearing *pro se* and accordingly, I must construe her Complaint more liberally than a complaint drafted by an attorney and grant dismissal of said Complaint only if it appears beyond doubt that she can prove no set of facts in support of her claim that would entitle her to relief, the fact remains that as pleaded, Plaintiff has not alleged that the NCAA is a "recipient" of federal funding. Absent such an allegation, I must conclude that she has failed to state a claim upon which relief can be granted and therefore, grant Defendant's Motion to Dismiss Count II of Plaintiff's Complaint.

Moreover, even assuming that I could infer from Plaintiff's Complaint that she had pleaded that Defendant was a recipient of federal funds based upon the "connections"

with federal funding listed in Plaintiff's Opposition Brief and discussed above, i.e. because the NCAA enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity, because the NCAA benefits greatly when students receive financial aid in that were such funds not available, student-athletes might not otherwise be financially able to participate in athletic programs due to the student-athletes' income limitations, because possibly financial aid may be premised on the participation in intercollegiate athletics, especially when the NCAA Manual places limitations and regulations on the receipt of federal financial aid for student-athletes, and because although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees, I still would be compelled to hold that Plaintiff has failed to state a claim under Title IX upon which relief can be granted in that said "connections" with federal funding simply are too far attenuated to qualify Defendant NCAA as a recipient of federal funds thus subjected to the mandates of Title IX.

Notably, in so holding, I emphasize that I find the case *sub judice* distinguishable from that of *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265, 272 (6th Cir.1994). In *Horner*, the United States Court of Appeals for the Sixth Circuit held that the Kentucky High School Athletic Assciation ("KHSAA"), a voluntary, self-managing, unincorporated association of public, private and parochial schools, was a recipient of federal funds and therefore, subject to Title IX, because: (1) pursuant to Kentucky statute, it was designated as the agent for another Defendant, the Kentucky State Board for Elementary and Secondary Education, which was subject to Title IX, in its function of managing interscholastic athletics and (2) it received dues from member schools which received federal funds. *Id.* at 272. Specifically, the court stated:

> [t]he most persuasive evidence of the KHSAA's status as a recipient is the fact that its functions are statutorily decreed to be those of the Board. The association is able to perform those functions because state law expressly permits the Board to designate an agent to manage interscholastic athletics. Ky.Rev.Stat.Ann. § 156.07(1), (2). This, in combination with the fact that KHSAA receives dues from member schools which do receive federal funds, indicates that the association qualifies as an 'agent' which indirectly receives federal funds as described in 34 C.F.R. § 106.2(h), and is thus subject to Title IX.

Id., citing, Grove City College v. Bell, 465 U.S. 555, 564-70, 104 S.Ct. 1211, 1216-20, 79 L.Ed.2d 516 (1984). In the instant case, even if the Defendant receives dues from member schools which receive federal funds, unlike the situation in *Horner*, there is no statutory connection between the parties such that the Defendant can be considered the "agent" of its member institutions that receive federal financial assistance.

Accordingly, Defendant's Motion to Dismiss Count II of Plaintiff's Complaint for failure to state a claim upon which relief can be granted is granted and Count II of Plaintiff's Complaint is dismissed.

III. *Plaintiff's Breach of Contract Claim.*

In Count III of her Complaint, Plaintiff has brought a state law claim for breach of contract. Specifically, Plaintiff alleges that she is the third-party beneficiary of agreements between the NCAA and member institutions to enforce the NCAA Constitution and Bylaws, agreements which were breached when Defendant denied athletic eligibility to Plaintiff thereby preventing her from receiving the benefits of the agreements. Defendant moves to dismiss Count III of Plaintiff's Complaint on multiple grounds, only one of which need be addressed at this juncture in the proceedings.

Jurisdiction over Count III of Plaintiff's Complaint is premised solely upon 28 U.S.C. § 1367. Complaint ¶ 30.

Section 1367(c) states that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if— . . . (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). In making the decision to decline to exercise jurisdiction under § 1367(c), the United States Court of Appeals for the Third Circuit instructs that I "should take into account generally accepted principles of 'judicial economy, convenience, and fairness to the litigants'." *Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277, 1284 (3d Cir.1993), *quoting, United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

Given my above holdings dismissing Counts I and II of Plaintiff's Complaint, the claims in Plaintiff's Complaint over which I had original jurisdiction, and taking into account the generally accepted principles of judicial economy, convenience and fairness to the litigants, I see no reason, given the preliminary stage at which this action is presently postured, to retain jurisdiction over Plaintiff's state law breach of contract claim and thus, I hereby elect under § 1367(c) not to exercise supplemental jurisdiction over Plaintiff's state law claim contained in Count III. Accordingly, Defendant's Motion to Dismiss Count III of Plaintiff's Complaint as a matter of law is granted and Count III of Plaintiff's Complaint is dismissed.

ORDER OF COURT

AND NOW, this 21st day of May, 1997, after careful consideration of the submissions of the parties and for the reasons set forth In the Opinion accompanying this Order, it is hereby ORDERED that Defendant's Motion to Dismiss Plaintiff's Complaint (Docket #: 4) is GRANTED in its entirety.

It is further ORDERED that Plaintiff's pending Motion for Disqualification Due to Conflict of Interest (Docket #: 11) is DISMISSED as moot.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH DIVISION

Case No.: 96-1604

Judge: Ambrose

R. M. SMITH,
Plaintiff,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant.

ORDER

This cause came to be heard on motion of Plaintiff to file her amended complaint, it is ordered that the plaintiff be, and is hereby given leave to:

1. File her amended complaint within five days from the date of this order;

2. Serve upon the defendant, NCAA, a copy of the amended complaint;

3. Make Hofstra University and the University of Pittsburgh additional defendants herein, and it appearing to the count that said defendants are proper parties;

4. Direct the issuance of service of process upon these two additional defendants;

5. Have the Court's Order granting defendant's Motion to Dismiss (Docket #4) be reviewed and modified accordingly; and

6. Reinstate the Plaintiff's pending Motion for Disqualification Due to Conflict of Interest (Docket #11).

June 5, 1997

ORDER

The Motion to Amend Complaint (Doc. No. 18) is denied as moot, the court having granted defendant's motion to dismiss on May 20, 1997.

By the Court:

/s/ Donetta W. Ambrose
DONETTA W. AMBROSE
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-3346 and 97-3347

R. M. SMITH
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
RENEE M. SMITH,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 96-01604)

Present: Greenberg, Nygaard and McKee, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued February 12, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 21, 1997 and the order entered June 6, 1997, be, and the same are hereby affirmed insofar as the dismissal of the Sherman Act claim, vacated insofar as the dismissal of the Title IX claim, reversed insofar as the denial of the motion for leave to amend the complaint

with respect to the Title IX claim, and the cause is remanded to the said District Court with direction to reinstate the state law contract claim and for further proceedings in accordance with the opinion of this Court. Each party to bear its own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ [ILLEGIBLE]
Clerk

Dated: March 16, 1998

APPENDIX E

[Received and Filed April 20, 1998]

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 97-3346 and 97-3347

R.M. SMITH

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

RENEE M. SMITH,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 96-01604)

BEFORE: BECKER, *Chief Judge*, and SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, *Circuit Judges*

The petitions for rehearing filed by appellant Renee M. Smith, and appellee, National Collegiate Athletic Association, in the above captioned matter having been submitted to the judges who participated in the decision of this court

and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petitions for rehearing are denied.

BY THE COURT:

/s/ [Illegible]
Circuit Judge

Dated: Apr. 20, 1998

APPENDIX F

20 U.S.C. § 1681(a) provides:

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and

principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such indi-

vidual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

29 U.S.C. § 794 provides:

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

42 U.S.C. § 2000d provides:

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

34 C.F.R. § 100.6 provides:

§ 100.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable

him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official

finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

34 C.F.R. § 106.2(h) (1986 and 1998) provides:

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.4(a) provides:

§ 106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

34 C.F.R. § 106.8 provides:

§ 106.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

34 C.F.R. § 106.71 provides:

§ 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 C.F.R. 100.6-100.11 and 34 CFR, part 101.

No. 98-84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R.M. SMITH,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION

MARCIA D. GREENBERGER
NEENA K. CHAUDHRY
VERNA L. WILLIAMS
Of Counsel
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W., Suite 800
Washington, D.C. 20036
(202) 588-5180

RENEE M. SMITH*
Pro Se
P.O. Box 2334
Wintersville, OH 43953
(740) 264-6986

August 26, 1998

*Counsel of Record

19 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit correctly held that the National Collegiate Athletic Association, a membership organization composed of federally funded colleges and unversities, is subject to the requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

No. 98-84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R.M. SMITH,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Respondent Renee Smith respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Third Circuit's decision holding that the National Collegiate Athletic Association ("NCAA") is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*.

STATEMENT OF THE CASE

Respondent Renee Smith filed her original complaint in this case in August 1996, alleging, *inter alia*, that the NCAA engaged in a pattern and practice of sex discrimination in

violation of Title IX by granting a disproportionate number of waivers of eligibility requirements under NCAA bylaws to male student-athletes. The NCAA moved to dismiss this claim on the basis that Smith had failed to allege that the NCAA is a recipient of federal aid. In responding to the motion to dismiss, Smith argued that the NCAA was subject to Title IX's requirements by virtue of its relationship to its member colleges and universities -- that is, it receives federal financial assistance indirectly in the form of dues from its federally funded member institutions and it acts as their agent with respect to the governance of intercollegiate athletics.

The district court granted the NCAA's motion to dismiss the Title IX claim on the ground that Smith had failed to allege that the NCAA is a recipient of federal aid. Recognizing its obligation to hold the allegations of *pro se* litigants to a lesser standard of scrutiny, however, the district court addressed Smith's argument, presented in her brief in opposition to the motion to dismiss, that the NCAA is subject to Title IX based on its relationship to its federally funded member institutions. The court ruled that the NCAA's receipt of membership dues from its federally funded member schools and its governance of the member schools' intercollegiate athletic programs were insufficient to subject the NCAA to Title IX's requirements. Accordingly, on May 21, 1997, the court dismissed the complaint.

The Third Circuit, in an opinion by Judge Greenberg, reinstated Smith's Title IX claim and held that the district court erred in denying Smith's motion to amend her complaint. In so doing, the Third Circuit began its analysis with the proposition that the NCAA acts as a surrogate for its federally funded member institutions, from which it concluded that Title IX's purposes would be defeated by drawing an artificial distinction between the NCAA and its member institutions. Thus, consistent with a wealth of authority holding similarly structured athletic associations accountable under Title IX and analogous statutes, the Third Circuit held that the NCAA is subject to Title IX. *See Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 271-72 (6th Cir. 1994) (athletic association subject to Title IX); *Dennin v. Connecticut Interscholastic Athletic Conference*, 913 F. Supp. 663 (D. Conn. 1996), *appeal dismissed as moot*, 94 F.3d 96 (2d Cir. 1996) (athletic conference subject to Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*); *Graham v. Tennessee Secondary Sch. Athletic Ass'n*, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995), *appeal dismissed*, 107 F.3d 870 (6th Cir. 1997) (athletic association covered by Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*); *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 863 F. Supp. 483 (E.D. Mich. 1994), *rev'd in part on other grounds*, 64 F.3d 1026 (6th Cir. 1995) (athletic association subject to Section 504); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 857 F. Supp. 654 (E.D. Mo. 1994), *rev'd on other grounds*, 40 F.3d 926 (8th Cir. 1994) (athletic association subject to Section 504). The court of appeals specifically relied on the Sixth Circuit's decision in *Horner*, which held that the Kentucky High School Athletic Association ("KHSAA") was subject to Title IX because it received dues from its federally funded member high schools and because it acted as an agent of the state board of education, which also received federal dollars. Rejecting the district court's attempt to distinguish *Horner* on the grounds that the association in that case was designated as an agent of the federal funds recipient by state statute, the Third Circuit held that "[t]he NCAA acts no less than the association in *Horner* as an agent of its member institutions merely because it lacks statutory authority for its activities." Pet. App. 14a.

Moreover, the Third Circuit specifically found that its ruling does not conflict with this Court's decision in *United States Department of Transportation v. Paralyzed Veterans of*

America, 477 U.S. 597 (1986). As the court of appeals recognized, the issue in *Paralyzed Veterans* was whether commercial airlines were "recipients" of federal funds within the meaning of Section 504 of the Rehabilitation Act. Organizations representing the disabled argued that the airlines were recipients because funds received directly by airport operators benefited the airlines once the funds were spent on the construction of runways, *inter alia*. The Third Circuit correctly noted, however, that the Court "drew a distinction between those entities which indirectly *benefit* from federal assistance and those that indirectly *receive* federal assistance, holding that only those [that] *receive* federal funds are within the statute." Pet. App. 15a (emphases added). Accordingly, the Court held that the airlines were merely incidental beneficiaries of federal funds and hence not subject to Section 504. The Third Circuit then concluded that *Paralyzed Veterans* does not control this case, because the NCAA is an indirect recipient of federal funds whose relationship to its members is markedly different from that of the airlines to the airport operators. "[U]nlike the commercial airlines in *Paralyzed Veterans*, the NCAA is not merely an incidental beneficiary of federal funds. Quite to the contrary . . . the relationship between the members of the NCAA and the organization itself is qualitatively different than that between airlines and airport operators, for . . . it would be unreasonable to characterize the latter as surrogates for the airlines." Pet. App. 16a. Thus, the Third Circuit held that if, as Smith alleged in her complaint, the NCAA receives dues from its members which receive federal funds, the NCAA would be subject to the requirements of Title IX.

REASONS FOR DENYING THE WRIT

This case conflicts neither with any decision of this Court nor with any court of appeals opinion, contrary to petitioner's assertions. Petitioner attempts to manufacture a

conflict between this case and *Paralyzed Veterans*. As the Third Circuit astutely observed, however, unlike the relationship between the airlines and airport operators at issue in *Paralyzed Veterans*, the NCAA is much more than an "incidental beneficiary" of federal funds; it *is* the sum of its member colleges and universities. Thus, drawing an artificial distinction between the NCAA and its member schools would only create a perverse situation whereby individual schools could attempt to evade Title IX's obligations by doing through the NCAA that which they are prohibited from doing on their own. Petitioner's argument that this case conflicts with decisions of other federal circuits is equally unavailing. The court of appeals cases cited by petitioner either follow *Paralyzed Veterans* and hence are inapplicable for the same reasons, or do not address the issue of whether athletic associations are subject to Title IX. Therefore, further review of this case is not warranted.

I. THE DECISION OF THE THIRD CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *PARALYZED VETERANS*

Petitioner's central argument for why this Court should grant review of this case is that the Third Circuit's decision conflicts with this Court's decision in *Paralyzed Veterans*. This argument fails, however, because the facts of this case are entirely distinguishable from those in *Paralyzed Veterans*.

First, unlike the airlines in *Paralyzed Veterans*, the NCAA actually receives money from its federally funded member institutions in the form of dues and in turn governs their intercollegiate athletics programs, bringing it within the ambit

of Title IX.[1] *See* 20 U.S.C. § 1687(4) (defining "program or activity"); 34 C.F.R. § 106.2(h) (defining "recipient"); *Horner*, 43 F.3d at 271-72 (holding that high school athletic association that receives dues from its federally funded member schools and acts as agent in governing interscholastic athletics programs was subject to Title IX). This fact alone distinguishes this case from *Paralyzed Veterans*, where the Court found that "not a single penny of the money [received by airport operators] is given to the airlines." 477 U.S. at 605. Nevertheless, the organizations of disabled citizens tried to argue that commercial airlines were indirect recipients of federal aid because the "money given to airports is simply converted by the airports into nonmoney grants to airlines." *Id.* at 606. The Court rejected their argument, and as the Third Circuit noted, drew a distinction between those entities that indirectly *benefit* from federal assistance and those that indirectly *receive* federal assistance. *Id.* at 606-07 (emphases added).

Moreover, the NCAA receives direct federal funding through a grant from the Department of Health and Human Services to the NCAA's National Youth Sports Program. This issue was raised in the Brief of *Amici Curiae* National Women's Law Center *et al.* filed in support of Smith in the Third Circuit. *See amicus* brief at 5 n.3. Although the Third Circuit did not rule on this argument, it constitutes yet another reason why *Paralyzed Veterans* is inapplicable to this case and is an alternate basis for holding the NCAA subject to Title IX.[2]

---

[1] The NCAA does not dispute that it receives dues from its members which receive federal funds. Pet. at 9 n.5.

[2] In *Cureton v. National Collegiate Athletic Ass'n*, No. Civ.A.97-131, 1997 WL 634376 (E.D. Pa. Oct. 9, 1997), the district court considered the question of whether the NCAA receives direct federal financial assistance in the context of a class-action lawsuit claiming that the NCAA is subject to Title VI. The court concluded that the NCAA is a "program or activity" covered by Title VI. It then considered whether the NCAA receives federal funds directly through the National Youth Sports Program and held that the plaintiffs had submitted enough evidence on this issue to withstand the NCAA's motion for summary judgment. Thus, the court held that the plaintiffs should be allowed to prove at trial that the NCAA receives direct federal funds through this program. *Id.* at *2. Accordingly, if Smith has the opportunity to amend her complaint on remand, as the Third Circuit held she should be allowed to do, she could allege that the NCAA is a direct recipient of federal funds as an alternative basis for holding the NCAA subject to Title IX.

Second, unlike the relationship between the airlines and airport operators in *Paralyzed Veterans*, the NCAA *is* the sum of its federally funded member institutions. Therefore, the Third Circuit properly rejected the NCAA's argument that it is beyond Title IX's reach, because the distinction that the NCAA tries to draw between itself and its member schools is totally artificial. As the Third Circuit found, the NCAA acts as an agent of its member institutions: "The NCAA is a voluntary organization created by and comprised of the educational institutions which essentially acts as their surrogate with respect to athletic rules." Pet. App. at 14a. The Third Circuit's finding is buttressed by this Court's characterization of the NCAA as an agent of its collective membership of colleges and universities. *See NCAA v. Tarkanian*, 488 U.S. 179, 196 (1988).[3] With the assent of its membership, the NCAA "adopt[s] rules, which it calls 'legislation,' . . . governing the conduct of the intercollegiate athletic programs of its members," and "[b]y joining the NCAA, each member agrees to abide by and to enforce such rules." *Id.* at 183. The NCAA's own constitution describes some of its purposes as follows: "[t]o formulate, copyright and publish rules of play governing intercollegiate athletics," and "[t]o legislate, through

[3] While the Court in *Tarkanian* held that the NCAA is not a state actor for the purposes of the Fourteenth Amendment, its reasoning was that the NCAA is an agent of its collective membership, including private institutions, not of any one state university. 488 U.S. at 193, 196.

bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics." *1993-94 NCAA Manual* 1, Const., Art. 1, § 1.2 (in Appellant Smith's App. to Third Circuit Brief at 12). As one court described the relationship between the NCAA and its member schools in the context of determining the association's tax exempt status:

> The activities of the NCAA are of the type the member universities and colleges could accomplish by committee except for the number of schools involved and the complexity of the world of major intercollegiate sports. The work of the NCAA staff is that which the members have decreed it shall do for the mutual benefit of, and assistance to, the member institutions' educational programs. We must conclude that the NCAA is but an extension of the member universities and colleges . . . .

NCAA v. Kansas Dep't of Revenue, 781 P.2d 726, 730 (Kan. 1989). Hence the decisions of the NCAA are the decisions of the member institutions, and the functions of the NCAA are those functions delegated to it by its members. *Id.* at 727 ("The voting membership [of the NCAA] is wholly composed of four-year colleges and universities and athletic conferences comprised of NCAA member institutions.").[4]

---

[4] In *Kansas Dep't of Revenue*, the NCAA itself adopted this characterization in order to obtain a state sales tax exemption for educational institutions. To qualify for such an exemption, the NCAA argued that it stands in the shoes of its member institutions and is nothing more than a membership organization composed of colleges and universities. The Kansas Supreme Court agreed. 781 P.2d at 726-30.

This surrogate relationship between the NCAA and its member institutions renders *Paralyzed Veterans* inapplicable to this case. The airlines in that case were not agents of the airports, and they did not govern the operations of airports as the NCAA governs the operations of its members' athletics programs. Rather, the airlines received only tangential, nonmonetary benefits -- e.g., runways, taxiways, and ramps -- from airport structures built using federal aid. Recognizing that such a relationship was too tenuous to consider the airlines recipients of federal aid, the Court held that they were merely incidental beneficiaries of the airports' use of the federal aid. By contrast, the Third Circuit's decision here correctly held that the relationship between the NCAA and its member schools is "qualitatively different" than that between the airlines and the airport operators in *Paralyzed Veterans*. There is no real distinction between the NCAA and its member institutions; hence the NCAA is not merely an incidental beneficiary of the federal aid received by its members, and *Paralyzed Veterans* does not control this case. In fact, in order to provide a useful parallel to this case, the factual scenario in *Paralyzed Veterans* would have had to be as follows: An airport received federal funds to run the airport, then stepped aside and created another entity -- Entity X -- to actually run the airport, and then Entity X claimed that it was not subject to the civil rights statutes. *Paralyzed Veterans* does not countenance this kind of subterfuge, which the NCAA seeks to accomplish here.

Furthermore, if this Court were to accept petitioner's argument that the NCAA is not subject to Title IX, member educational institutions could attempt to do indirectly through the NCAA that which they are prohibited from doing under Title IX directly. For example, if the NCAA through a vote of its members issued discriminatory scholarship legislation -- e.g., stating that no more than 10% of athletic scholarships can be awarded to women -- the member schools might try to hide

behind the NCAA because it would not be subject to Title IX.[5] Such a result would be contrary to the letter and spirit of Title IX and would undermine Congress' intent to "accord [Title IX] a sweep as broad as its language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (internal quotation marks and citations omitted). Therefore, the Third Circuit's decision is in accord with this Court's opinion in *Paralyzed Veterans*.

II. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER FEDERAL CIRCUITS

Petitioner also argues that the Third Circuit's decision conflicts with decisions of other federal circuits, relying primarily on cases that implement the holding of *Paralyzed Veterans*. These progeny of *Paralyzed Veterans*, however, are inapplicable to this case for the same reasons that *Paralyzed Veterans* is inapplicable. Moreover, the other cases cited by petitioner fail to address the relevant issue of whether membership organizations of federally funded entities are subject to Title IX. Hence there is no division among the federal circuits over the Title IX issue decided by the Third Circuit.

First, petitioner contends that the Third Circuit's decision conflicts with decisions of other circuits recognizing that Title

---

[5] Of course, an individual institution that complied with such a discriminatory rule would not be relieved of Title IX's mandate not to discriminate, the rules of any association notwithstanding. 34 C.F.R. § 106.6(c) ("The obligation to comply with [Title IX] is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association . . . ."). However, since no one member has the authority to change NCAA rules, obtaining relief against an individual institution in such a situation would be virtually impossible unless the NCAA itself was subject to suit.

IX, Section 504, and Title VI contain parallel language and should be interpreted in the same manner. Petitioner also cites a number of cases in other circuits holding, consistent with *Paralyzed Veterans*, that section 504 does not cover mere beneficiaries of federal aid, such as a counselor employed at a hospital receiving federal aid, *Grzan v. Charter Hosp. of Northwest Indiana*, 104 F.3d 116, 119-20 (7th Cir. 1997); a baseball club that benefited from a city's federal grant for stadium improvement, *Disabled in Action v. Mayor & City Council*, 685 F.2d 881, 884-85 (4th Cir. 1982); or a bank that made student loans that are subsidized and guaranteed with federal funds, *Gallagher v. Crogham Colonial Bank*, 89 F.3d 275 (6th Cir. 1996). Petitioner's arguments have merit only if its central premise -- that the Third Circuit's decision in this case conflicts with the holding in *Paralyzed Veterans* -- is correct. As explained in the previous section, this premise is false.

Second, petitioner claims that the Third Circuit's decision conflicts with decisions involving third-party liability of federal funding recipients, citing cases that are removed from their proper context, and in any event, have no bearing on the issue in question. *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996), and *Smith v. Metropolitan School District Perry Township*, 128 F.3d 1014 (7th Cir. 1997), addressed the issues of when a school district is liable for student-to-student sexual harassment and teacher-to-student sexual harassment, respectively. Neither of these cases even remotely addressed whether an athletic association that receives money from federally funded schools for governing their intercollegiate athletic programs is covered by Title IX. Moreover, there was no question of Title IX coverage in these cases, as it was clear that the schools were subject to Title IX. The only question was, in light of Title IX's contractual nature, what kind of notice must a school have before it can be subjected to liability in damages for the

sexual harassment of its students by teachers or other students.

Finally, petitioner asserts that the Third Circuit's decision conflicts with the Tenth Circuit's decision in *NCAA v. Califano*, 622 F.2d 1382 (10th Cir. 1980), which held in part that the NCAA did not have standing in its own right to challenge certain Health, Education and Welfare Department ("HEW") regulations promulgated under Title IX. The Tenth Circuit adopted the reasoning of the district court, which accepted the NCAA's allegation that it received no federal financial assistance and noted that the NCAA raised no issue of possible direct applicability of the challenged regulations to itself as an association. Accordingly, the district and circuit courts held that the regulations could not result in any injury to the NCAA. *Id.* at 1387; *NCAA v. Califano*, 444 F. Supp. 425, 430-31 (D. Kan. 1978).

At issue here, however, are direct actions taken by the NCAA itself. *Califano*, moreover, was decided before *Grove City College v. Bell*, 465 U.S. 555 (1984), in which this Court held: "Nothing in [Title IX] suggests that Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance." *Id.* at 564. Thus, the *Califano* court would not have had any occasion to consider the issues presented in this case, such as whether the NCAA received federal aid indirectly through its member institutions and whether its surrogate relationship with its members should subject it to Title IX. Even the NCAA at the time of *Califano* was not the same as the NCAA today -- for example, its purpose in 1980 was "limited to the promotion and governance of intercollegiate athletics for men."[6]

[6] Petitioner's statement that *Califano* recognized that the NCAA was not a surrogate for its member institutions is thus misleading. Pet. at 21 n.13. The NCAA's interests at that time were clearly not identical to the interests of its members because the member institutions also had an interest in promoting and governing women's athletics, an interest that was represented in *Califano* by the NCAA's counterpart, the Association for Intercollegiate Athletics for Women ("AIAW"). *See Califano*, 444 F. Supp. at 433. The NCAA today governs intercollegiate athletics for men and women, and its interests with respect to athletics are those of its member schools.

Califano, 444 F. Supp. at 433. Thus, *Califano*'s holding that the Title IX regulations do not apply to the NCAA at that time does not carry the weight that petitioner assigns it and creates no conflict with the decision of the Third Circuit here.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARCIA D. GREENBERGER
NEENA K. CHAUDHRY
VERNA L. WILLIAMS
Of Counsel
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

RENEE M. SMITH*
Pro Se
P.O. Box 2334
Wintersville, OH 43953
(740) 264-6986

August 26, 1998

*Counsel of Record

No. 98-84

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,
v.
R. M. SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

ELSA KIRCHER COLE
General Counsel
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
6201 College Boulevard
Overland Park, KS 66211
(913) 339-1906

MARTIN MICHAELSON
JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5810

JOHN J. KITCHIN
ROBERT W. MCKINLEY
SWANSON, MIDGLEY, GANGWERE, KITCHEN & MCLARNEY
922 Walnut Street
Suite 1500
Kansas City, MO 64106
(816) 842-6100

* Counsel of Record
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12 pp

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 98-84

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,
v.
R. M. SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

1. Acknowledging the importance of this case, respondent agrees that it presents the question whether the NCAA is subject to Title IX simply because the NCAA "receives dues from its members which receive federal funds." Opp. i, 4. Respondent—joined in her efforts by the National Women's Law Center—does not dispute that this case has enormous practical implications for the NCAA, as well as for similar organizations. *See* Pet. 22-24. And respondent defends the Third Circuit rationale without giving an inch of ground, acknowledging that it extends to the threshold coverage determination under "analogous statutes," such as Section 504 of the Rehabilitation Act and Title VI of the Civil Rights Act of 1964. Opp. 3; note 2, *infra*.[1]

[1] The importance of this case has not escaped the attention of non-parties either. *See, e.g.*, Brian Landman, *NCAA: On Shaky*

2. In seeking to avoid plenary review, respondent instead asserts the absence of a conflict, arguing that this case is "entirely distinguishable from * * * *Paralyzed Veterans*." Opp. 5. This assertion is utterly belied by *Paralyzed Veterans* and this Court's subsequent decisions.[2]

a. Respondent first claims that the fact that "the NCAA actually receives money from its federally funded member institutions in the form of dues" "alone distinguishes this case from *Paralyzed Veterans*," because the airlines in *Paralyzed Veterans* indirectly benefited from federal assistance only in the form of " 'nonmoney grants.' " Opp. 5-6 (quoting *Paralyzed Veterans*, 477 U.S. at 606). But *Paralyzed Veterans* itself negates that distinction; the Court specifically recognized that "federal financial assistance may take nonmoney form." 477 U.S. at 607-608 n.11. Thus, the touchstone in determining whether federal coverage applies is not whether the entity indirectly benefits in the form of money *or* nonmoney assistance, but rather—as the *Paralyzed Veterans* Court made clear in

---

Ground?, St. Petersburg Times, July 19, 1998, at 1C ("On March 16, a U.S. appellate court held that since NCAA member institutions receive federal funding, the NCAA itself is subject to Title IX. That ruling could lead to lawsuits over the number of scholarships offered per sport and the money spent on various championship events."); Jack Carey *et al.*, *NCAA Strains Under Weight of College Sports*, Salt Lake Trib., July 2, 1998, at D3 (discussing same); Jack Carey *et al.*, *Patching Up the NCAA Organization*, USA Today, June 30, 1998, at 1C ("If the ruling [in this case] stands, it could prompt suits against the NCAA over such issues as the number of scholarships per sport."); Mark Asher *et al.*, *Lawsuits Against the NCAA May Alter College Sports*, Ariz. Republic, May 13, 1998, at C5 (discussing same).

[2] While respondent attempts to distinguish *Paralyzed Veterans* based on certain facts, she does not dispute that the Court's interpretation in *Paralyzed Veterans* of the federal funding trigger in Section 504 controls for purposes of interpreting the identical trigger contained in Title IX and the other program-specific statutes. *See* Pet. 2 & n.1. Indeed, respondent impliedly acknowledges that "Title IX, Section 504, and Title VI * * * should be interpreted in the same manner." Opp. 10-11.

distinguishing *Grove City College* v. *Bell*, 465 U.S. 555 (1984)—whether the indirect beneficiary is an "intended recipient" of the aid. 477 U.S. at 607; *see id.* at 608 n.11.

In *Paralyzed Veterans* it was "clear that the [intended] recipients of the federal assistance extended by Congress under the [Airport] Trust Fund are the airport operators." *Id.* at 608. Thus, federal coverage stopped with the operators; it did not "follow[] the aid past the [operators] to those who merely benefit from the aid." *Id.* Here, it is clear that the intended recipients of the federal assistance extended by Congress are the colleges and universities. *See* Pet. 4 & n.2. Thus, federal coverage stops with those institutions; it does not follow the aid past them to the NCAA, which if it indirectly benefits from the aid at all does so only because the institutions have decided to pay nominal membership dues. Indeed, in this case as in *Paralyzed Veterans* there is no claim that *Congress* actually "intended [the alleged indirect beneficiary] to receive [the] money." 477 U.S. at 607. The Third Circuit consciously disregarded this reasoning, *see* Pet. App. 15a ("Notwithstanding the parallel language of the Rehabilitation Act and Title IX, we do not apply the *Paralyzed Veterans* Court's definition of 'recipient' to Title IX"), leading it to reach a result in direct conflict with *Paralyzed Veterans*.

This direct conflict warrants plenary review. As this Court recognized in *Paralyzed Veterans*, extending federal coverage beyond intended recipients to those who merely indirectly benefit from federal aid—either money or nonmoney—would have two unacceptable consequences. First, it would give the program-specific statutes "almost limitless coverage." *Id.* at 608. Second, it would undermine the contractual framework on which those statutes are based. *Id.* at 605-606. As we explained in our petition (p. 10 n.6), and respondent does not dispute, this Court's subsequent decisions—including its decision last Term in *Gebser* v. *Lago Vista Independent School District*, 118 S. Ct. 1989 (1998)—underscore the importance of the contractual underpinning of Title IX liability.

The Third Circuit decision all but eliminates that underpinning, extending the program-specific statutes to virtually every individual and entity that receives money from an entity that receives federal funds. Congress plainly did not intend that result.

Perhaps recognizing this, respondent now suggests (Opp. 6) that the NCAA is a *direct* federal funding recipient. This is a red herring; the NCAA receives none of the federal funds disbursed to the separate National Youth Sports Program. Respondent did not point to this program as a basis for subjecting the NCAA to Title IX below, and, as respondent herself acknowledges, "the Third Circuit did not rule on this argument." Opp. 6.[3] Instead, "the Third Circuit held that if, as Smith alleged in her complaint, the NCAA receives dues from its members which receive federal funds, the NCAA would be subject to the requirements of Title IX." *Id.* 4; *see* Pet. 6-7. That ruling clearly conflicts with *Paralyzed Veterans*, already has led to perverse results in other cases, and disposes of the coverage determination in this case. *See infra* at 8. It should not be permitted to stand based on an

[3] Respondent's *amici* referred in passing to this theory in a footnote to its *amicus* brief in the Court of Appeals, but it is settled that a court will "consider only issues argued in the briefs filed by the *parties* and not those argued in the briefs filed by interested nonparties." *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 731 (3d Cir.) (emphasis added), *cert. denied*, 516 U.S. 916 (1995). And, of course, parties may not dodge plenary review by seeking to introduce new legal theories in this Court, especially when, as here, it is undisputed that the new theory was neither advanced by the parties nor passed upon below. *See Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 522-523 (1991) (refusing to consider argument "raised * * * for the first time in [party's] brief in opposition to the petition for writ of certiorari"); *Perry* v. *Thomas*, 482 U.S. 483, 492 (1987) ("alternative ground * * * does not prevent us from reviewing the ground exclusively relied upon by the courts below"); *see also Wilson* v. *Arkansas*, 514 U.S. 927, 937 n.4 (1995); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 725-726 (1989); *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593 (1985).

eleventh-hour suggestion that the NCAA may be subject to Title IX on an alternative basis never raised by respondent, or passed upon by the courts below.

b. In attempting to explain away the clear conflict between the Third Circuit decision and *Paralyzed Veterans*, respondent also argues that "[t]here is no real distinction between the NCAA and its member institutions." Opp. 9; *see id.* 7-10. The notion that the NCAA is merely a "surrogate" (Opp. 7) for its members is unfounded as a practical matter, especially when it comes to the non-athletic activities with respect to which all or virtually all of the federal funding received by member institutions is allocated. *See* Pet. 21-22 n.13.[4] Indeed, in *NCAA* v. *Tarkanian*, 488 U.S. 179, 190 (1988) (quotation omitted), this Court reversed a lower court decision holding that the NCAA is a state actor based in part on a similar premise—*i.e.*, that because " 'many NCAA mem-

[4] Respondent claims that our reliance on *NCAA* v. *Califano*, 444 F. Supp. 425 (D. Kan. 1978), *rev'd on other grounds*, 622 F.2d 1382 (10th Cir. 1980), is "misleading" because at the time the case was decided the NCAA allegedly had an interest only in promoting men's athletics. Opp. 12-13 n.6. But the court's findings on the divergence in interests between the NCAA and its members was not limited to the promotion of men's versus women's sports. Indeed, the court spoke in broad terms, recognizing that "the NCAA does not (for good cause) purport to speak generally for post-secondary institutions of higher education on such all-encompassing matters of general administrative concern as curriculum and budget planning, academic freedom, internal governance, and so forth. The NCAA's interests are therefore *not* coterminous with or identical to the broader interests of all or any of its institutional members." 444 F. Supp. at 433 (emphasis added). Moreover, as the court also noted, "however worthy the aims and programs of the NCAA may be within its proper sphere, some might view the purposes of the NCAA as *inimical* to legitimate overall interests and objectives of particular educational institutions." *Id.* (emphasis added). That is scarcely what one would expect to find from the type of surrogate relationship hypothesized by respondent.

ber institutions were either public or government supported,' " the NCAA itself must be a public entity.[5]

Moreover, in *Paralyzed Veterans* this Court squarely rejected the argument—reinvented by respondent here—that an entity which is not itself an actual or intended federal funding recipient may become one by virtue of the fact that it is " 'inextricably intertwined' with an institution that [is]." 477 U.S. at 610. *See Dunlap* v. *Association of Bay Area Gov'ts*, 996 F. Supp. 962, 968 (N.D. Cal. 1998) (entities "that are 'inextricably intertwined' with actual recipients, are *not* on that basis covered") (citing *Paralyzed Veterans*, 477 U.S. at 607-610; emphasis added). Compelling institutional considerations support this rule. As this Court has recognized, threshold jurisdictional determinations—such as whether the program-specific statutes apply to a particular individual or entity—should not be subjected to fact-driven inquiries that are "hard to apply," "jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invite[] complex argument in a trial court and a virtually inevitable appeal." *Grubart* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Respondent's "surrogate" approach for determining when federal coverage applies suffers from each of these flaws.

Respondent's approach also departs from the contractual framework established by Congress in enacting Title IX and the other program-specific statutes, and emphasized by this Court in interpreting these statutes, which

[5] The NCAA constitution, moreover, draws clear lines between the association and its members. Thus, for example, while the constitution authorizes the NCAA to adopt legislation governing intercollegiate athletics, NCAA const. art. 5, it provides that "[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself." *Id.* art. 6.01.1. In addition, we note that, as respondent herself recognizes (Opp. 10 n.5), existing law would prevent public colleges and universities from attempting to use the NCAA as a vehicle to shirk their Title IX obligations.

was intended to predicate federal regulatory coverage on "the recipient's acceptance of the funds." *Paralyzed Veterans*, 477 U.S. at 605. The contractual analysis has the salutary effect of providing "the receiving entity of federal funds * * * notice" that it is covered. *Gebser*, 118 S. Ct. at 1998 (quotation omitted). Furthermore, it makes coverage dependent on the legal determination whether the entity was an intended recipient under the particular grant statute in question, rather than the factually intensive and unpredictable determination whether the entity is sufficiently "interrelated" with a federal funding recipient to be subsumed by federal coverage.

3. While respondent understandably devotes the bulk of her brief to attempting to obscure the direct conflict with *Paralyzed Veterans*, she also briefly attempts to refute the circuit conflicts created by the decision below. *See* Opp. 10-12. This effort is itself telling. Indeed, respondent candidly acknowledges that if "the Third Circuit decision in this case conflicts with the holding in *Paralyzed Veterans*," then the Third Circuit decision also conflicts with the numerous decisions from other circuits that have faithfully limited the reach of the program specific statutes to actual and intended recipients of federal assistance. Opp. 11; *see* Pet. 16-18 (discussing cases). Thus, because the Third Circuit decision *does* conflict with *Paralyzed Veterans*, respondent has no basis for distinguishing these decisions. This circuit conflict underscores the need for this Court's review.[6]

[6] Respondent says there is no conflict between the Third Circuit decision below and the circuit decisions involving the third-party liability of actual federal funding recipients. *See* Opp. 11-12. But she acknowledges that these cases speak directly to "Title IX's contractual nature," *id.* 11, which—as we have explained (Pet. 18-20)—is the basis on which they plainly conflict with the decision below. Respondent also fails in attempting to obscure the conflict between the decision below and *Califano*, which held that the NCAA lacked standing to challenge the Title IX regulations on its own behalf. The simple reason that the courts in *Califano* held that the NCAA

4. The decision below not only flies in the face of precedent, but has already led to perverse results. In *Kemether* v. *Pennsylvania Interscholastic Athletic Ass'n*, No. Civ. A. 96-6986, 1998 WL 464921 (E.D. Pa. Aug. 6, 1998), for example, the court—following the Third Circuit decision in this case—held that a state high school athletic association was subject to Title IX based primarily on the fact that the association "is funded in part by dues from its member schools, most of which are public schools" that receive federal assistance. *Id.* at *29. In so holding, the court specifically rejected the association's argument that it was not subject to Title IX because the Office of Civil Rights had "determined that [it] was *not* a recipient of federal assistance under § 504 of the Rehabilitation Act, which defines 'recipient' in terms materially identical to those of Title IX." *Id.* at *29 n.16 (emphasis added). As the court put it, this argument—not to mention the "agency's legal conclusion" that the association was *not* a covered recipient— was "fatally undermined by the Third Circuit's subsequent decision in *Smith*." *Id.*

In other words, under the Third Circuit decision below, the agency's *own* determination that an entity is not a covered federal funding recipient may be disregarded. That fact alone speaks volumes about how far the Third Circuit has strayed from *Paralyzed Veterans*. This Court

---

lacked such standing is that no one believed that Title IX applied to the NCAA. *See* Pet. 20. The Third Circuit decision below turns that heretofore settled understanding upside down, subjecting the NCAA to Title IX and the other program-specific statutes despite the absence of any indication whatsoever that Congress intended these statutes to reach the NCAA or similar indirect beneficiaries of federal aid. Finally, respondent claims that the decision below is "consistent with" *Horner* v. *Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994). Opp. 2-3. As we have explained (Pet. 20-21), that is not so. But to the extent that *Horner* supports the Third Circuit ruling below, it simply heightens the need for this Court to clarify that it meant what it said in *Paralyzed Veterans*.

should grant certiorari and reverse the far-reaching decision below.

* * * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ELSA KIRCHER COLE
General Counsel
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
6201 College Boulevard
Overland Park, KS 66211
(913) 339-1906

MARTIN MICHAELSON
JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5810

JOHN J. KITCHIN
ROBERT W. MCKINLEY
SWANSON, MIDGLEY, GANGWERE, KITCHEN & MCLARNEY
922 Walnut Street
Suite 1500
Kansas City, MO 64106
(816) 842-6100
Counsel for Petitioner

* Counsel of Record

(3)

No. 98-84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R. M. SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

JOINT APPENDIX

MARTIN MICHAELSON
JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

JOHN J. KITCHIN
ROBERT W. MCKINLEY
SWANSON, MIDGLEY, GANGWERE, KITCHIN & MCLARNEY
922 Walnut Street
Suite 1500
Kansas City, MO 64106
(816) 842-6100

ELSA KIRCHER COLE
General Counsel
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
6201 College Boulevard
Overland Park, KS 66211
(913) 339-1906
Counsel for Petitioner

CARTER G. PHILLIPS *
VIRGINIA A. SEITZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED JULY 14, 1998
CERTIORARI GRANTED SEPTEMBER 29, 1998

5 pp

TABLE OF CONTENTS

The appendix to the petition for certiorari contains the following material which is omitted from the Joint Appendix:

U.S. DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
(PITTSBURGH)

Civil Docket for Case #: 96-CV-1604

SMITH

v.

NATIONAL COLLEGIATE, *et al*,

RELEVANT DOCKET ENTRIES

Date	No.	PROCEEDINGS
2/27/96	1	COMPLAINT Filing Fee $120.00 Receipt #1872 (ces) [Entry date 08/29/96]
10/28/96	5	MOTION by NATIONAL COLLEGIATE to Dismiss with Proposed Order. (Attorney: Christine A. Ward, Elizabeth T. Phillips) (ces) [Entry date 10/29/96]
11/19/96	9	BRIEF by R. M. SMITH in opposition to [5-1] motion to Dismiss by NATIONAL COLLEGIATE (ces) [Entry date 11/20/96]
11/25/96	10	REPLY BRIEF by NATIONAL COLLEGIATE to [9-1] brief in opposition by R. M. SMITH (ces)
5/20/97	17	ORDER granting in its entirety deft's [5-1] motion to Dismiss; dismissing as moot [11-1] motion for Disqualification due to Conflict of Interest (signed by Judge Donetta W. Ambrose on 5/21/97) CM all parties of record. Notices mailed. (ces) [Entry date 05/21/97]
5/30/97	18	MOTION with Brief in Support by R. M. SMITH to Amend [1-1] complaint (ces) [Entry date 06/02/97]

Date	No.	PROCEEDINGS
5/30/97	—	BRIEF by R. M. SMITH in support of [18-1] motion to Amend [1-1] complaint by R. M. SMITH (w/no. 18) (ces) [Entry date 06/06/97]
6/5/97	19	RESPONSE (SUGGESTIONS IN OPPOSITION) by NATIONAL COLLEGIATE to [18-1] motion to Amend [1-1] complaint by R. M. SMITH (ces) [Entry date 06/06/97]
6/6/97	—	ORDER upon motion denying as moot [18-1] motion to Amend [1-1] complaint, Ct. having granted deft's motion to dismiss on 5/20/97 (signed by Judge Donetta W. Ambrose on 6/5/97 CM all parties of record. (ces)
6/18/97	20	NOTICE OF APPEAL by R. M. SMITH from [17-1] order date 5/21/97 FILING FEE $105. RECEIPT #7351 TPO issued. (pt)
6/18/97	21	NOTICE OF APPEAL by R. M. SMITH from [0-0] order dated 6/6/97 FILING FEE $105/ RECEIPT #7351 TPO issued. (pt)
5/1/98	24	Certified copy of JUDGMENT dated 3/16/98 issued in lieu of a formal mandate on 4/29/98 received from USCA re: appeals filed 6/18/98 at document nos. 20 and 21 affirming the judgment of the District court entered 5/21/97 and order entered 6/6/97 insofar as dismissal of the Sherman Act claim, vacated insofar as dismissal of Title IX claim, reversed insofar as the denial of the motion for leave to amend the complaint with respect to the Title IX claim and the cause is remanded to the District court with direction to reinstate the state law contract claim and for further proceedings in accord with the opinion of this Court. Each party to bear own costs. All of the above in accord with the opinion of the Circuit Ct. (ces) [Entry date 05/04/98]

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Docket # 97-3346 & 97-3347

SMITH

v.

NATL COLLEGIATE

Appeal from: U.S. District Court for the Western District of Pennsylvania

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
6/24/97	CIVIL CASE DOCKETED. Notice filed by Renee M. Smith. (sma) [97-3347]
3/16/98	PUBLISHED OPINION (Greenberg, Authoring Judge, Nygaard, McKee, Circuit Judges), filed. (sma) [97-3346 97-3347]
3/16/98	JUDGMENT affirming insofar as the dismissal of the Sherman Act Claim, vacating insofar as the dismissal of the Title IX claim, reversing insofar as the denial of the motion for leave to amend the complaint with respect to the Title IX claim and remanding to the District Court with direction to reinstate the state law contract claim, filed (sma) [97-3346 97-3347]
4/20/98	ORDER (Becker, Chief Judge, Sloviter, Stapleton, Mansmann, Greenberg, Authoring Judge, Scirica, Cowen, Nygaard, Alito, Roth, McKee, Rendell, Circuit Judges) denying petitions for in rehearing by Appellant Renee M. Smith and Appellees Natl Collegiate, Natl Collegiate, filed. (sma) [97-3346 97-3347]

(4)

No. 98-84

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R. M. SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR PETITIONER

ELSA KIRCHER COLE
General Counsel
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
6201 College Boulevard
Overland Park, KS 66211
(913) 339-1906

MARTIN MICHAELSON
JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

JOHN J. KITCHIN
ROBERT W. MCKINLEY
SWANSON, MIDGLEY, GANGWERE, KITCHIN & MCLARNEY
922 Walnut Street
Suite 1500
Kansas City, MO 64106
(816) 842-6100
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

61 pp

QUESTION PRESENTED

Whether the Court of Appeals correctly held—in conflict with this Court's decision in *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), decisions of other federal circuits, and the clear intent of Congress—that the National Collegiate Athletic Association, a private organization that does not itself receive federal financial assistance, is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, because it receives payments from entities that do.

PARTIES TO THE PROCEEDING

This action was brought by respondent Renee M. Smith, plaintiff-appellant below, against petitioner National Collegiate Athletic Association ("NCAA"), defendant-appellee below, a voluntary, unincorporated association consisting primarily of public and independent colleges and universities. Smith and the NCAA were the only parties to the proceeding in the court whose judgment is under review. After entry of that judgment, Smith was granted leave to file an amended complaint adding as defendants Hofstra University and the University of Pittsburgh. Because they were not parties to the proceeding below, the university defendants have not appeared in this Court.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-84

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R. M. SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 139 F.3d 180 and reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a. The opinion of the District Court for the Western District of Pennsylvania is reported at 978 F. Supp. 213 and reprinted at Pet. App. 21a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1998. *Id.* 37a-38a. Both parties filed timely petitions for rehearing and suggestions for rehearing in banc, which were denied on April 20, 1998. *Id.* 39a. The petition for certiorari was filed on July 14, 1998, and granted on September 29, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681(a), provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Other pertinent statutory and regulatory provisions are reprinted in the addendum hereto.

INTRODUCTION

This case concerns the reach of Title IX to private entities or organizations that do not receive federal aid, but have members that do. Title IX by its terms applies to programs or activities "receiving Federal financial assistance." 20 U.S.C. § 1681(a). In *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597, 610 (1986), this Court held that "Title IX"—like the other program-specific statutes with the same federal funding trigger—"draws the line of federal regulatory coverage between the recipient and the beneficiary."[1] It "covers those who receive the aid, but does not extend as far as those who benefit from it." *Id.* at 607. The "key" in gauging when federal coverage attaches is thus to determine whether the defendant

[1] In addition to Title IX, the program-specific statutes include Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d (emphasis added), which prohibits discrimination against persons on the basis of race, color, or national origin in "any program or activity *receiving Federal financial assistance*"; Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 (emphasis added), which prohibits discrimination against disabled persons in "any program or activity *receiving Federal financial assistance*"; and Section 303 of the Age Discrimination Act of 1975, 42 U.S.C. § 6102 (emphasis added), which prohibits discrimination against persons on the basis of age in "any program or activity *receiving Federal financial assistance*."

"*receive*[*s*] federal financial assistance." *Id.* (emphasis in original).

This limitation not only follows naturally from the text and purpose of Title IX, but is compelled by its origin. Title IX was enacted pursuant to Congress' spending power, U.S. Const. art. I, § 8, cl. 1, and thus acts to "condition[] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1997 (1998). This contractual obligation runs to and stops with the recipient that knowingly and voluntarily assumes it in exchange for federal funds; as this Court recognized last Term in *Gebser*, the obligation may not be expanded on the basis of vicarious liability or agency law principles. *Id.* at 1996, 1999.

Like most private membership organizations, the National Collegiate Athletic Association ("NCAA")—an association of the Nation's colleges and universities—does not itself receive federal aid. Many of its members, on the other hand, do. The Third Circuit held below that the NCAA is covered by Title IX because it "receives dues from its members which receive federal funds." Pet. App. 16a. That ruling flouts the clear intent of Congress to limit Title IX "to those who actually 'receive' federal financial assistance," *Paralyzed Veterans*, 477 U.S. at 605, departs from the framework this Court has established for determining when federal coverage attaches, and, if embraced, would extend Title IX to entities that have never knowingly or voluntarily entered into the Spending Clause contract with the federal government. It should be reversed.

STATEMENT OF THE CASE

Most colleges and universities receive federal financial assistance triggering coverage under Title IX and the other program-specific statutes.[2] In the case of Title IX, the

[2] Colleges and universities are eligible to participate in a number of federal grant and other programs, including those covering stu-

receipt of such assistance obligates an institution—"as a *quid pro quo* for the receipt of federal funds," *Paralyzed Veterans*, 477 U.S. at 605 (quotation omitted)—not to discriminate on the basis of sex in any "education program or activity" offered by the institution. 20 U.S.C. § 1681(a). That includes athletics. *See* 34 C.F.R. § 106.41(a) (prohibiting discrimination "in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient"). A recipient's duty to comply with Title IX "is not obviated or alleviated by any rule or regulation of any * * * athletic or other league, or association" to which it belongs. *Id.* § 106.6(c).

The NCAA is a voluntary, unincorporated association with some 1200 members, consisting primarily of public and independent colleges and universities across the country, as well as certain athletic conferences, associations, and other education institutions. In contrast to most of its members, the NCAA itself does not receive federal financial assistance—whether in the form of grants, loans, or participation in other federal aid programs. Instead, the NCAA funds its activities through the receipt each year of approximately $200 million in revenues from television royalties, championship events, and various sales and services. The NCAA also collects about $900,000 annually in dues from its members, accounting for less than one percent of the NCAA's total annual operating revenues.

The NCAA was founded in 1906 at the urging of President Theodore Roosevelt to quell public outcry over recent deaths in college football. Since then, it has "play[ed] a critical role in the maintenance of a revered tradition of amateurism in college sports." *NCAA* v.

---

dent grants and loans, construction and maintenance of education facilities, research, and faculty training and development. *See* 34 C.F.R. pt. 100, App. A (compiling statutory programs).

Board of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984). Toward this end, the NCAA adopts and helps to enforce rules—called legislation—governing such matters as athletic events, eligibility, recruitment, admissions, financial aid, and size of athletic squads and coaching staffs. Members vote on NCAA legislation at annual conventions, and agree to abide by and enforce those rules when they join the NCAA. *See NCAA* v. *Tarkanian*, 488 U.S. 179, 183 (1988).[3]

While the interests of the NCAA and its members overlap, they are not coterminous. As one court put it, "[t]he NCAA serves the common need of member institutions for regulation of athletics while correlating their diverse interests." *Arlosoroff* v. *NCAA*, 746 F.2d 1019, 1022 (4th Cir. 1984). Thus, while NCAA rules or enforcement actions reflect the views of the membership *as a whole*, they may be at direct odds with the interests of individual members. In fact, as this Court has recognized, the NCAA and individual members sometimes act "much more like adversaries than like partners." *Tarkanian*, 488 U.S. at 196. In addition, the NCAA constitution draws clear lines between the association and particular members. Thus, while the charter authorizes the NCAA to pass legislation governing intercollegiate athletics, NCAA const. art. 5, it provides that "[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself." *Id.* art. 6.01.1.

This case arises due to the application of one of the NCAA's rules to respondent. Smith played intercollegiate volleyball for St. Bonaventure University during the 1991-

---

[3] The NCAA constitution expressly embraces the "principle of gender equity." NCAA const. art. 2.3.2. The constitution not only directs the NCAA to operate "in a manner free of gender bias," but states that "[it] is the responsibility of each member institution to comply with federal and state laws regarding gender equity." *See id.*

92 and 1992-93 seasons. She elected not to play during the 1993-94 season, and graduated early. Smith then entered postgraduate programs at Hofstra University and the University of Pittsburgh, where she sought to renew her intercollegiate volleyball career. Under the NCAA's postbaccalaureate rule—which governs when student-athletes may participate in intercollegiate athletics at a postgraduate institution other than the one from which they received their undergraduate degree—she was ineligible to do so. Hofstra and the University of Pittsburgh sought a waiver of this rule in Smith's case, but the NCAA denied their requests and the universities refused to permit Smith to participate in their intercollegiate volleyball programs. *See* Pet. App. 3a-4a.

Smith thereupon brought this action alleging that the NCAA had violated Title IX by refusing to waive the postbaccalaureate rule, seeking both monetary and declaratory relief. *See* Pet App. 2a n.1 & 3a-4a.[4] The NCAA moved to dismiss on the ground that the complaint failed to allege that the NCAA is a federal funding recipient, and that, even if it had, Smith could not establish that the NCAA receives any federal assistance that would trigger Title IX. In response, Smith argued that the NCAA is subject to Title IX because its *members* receive federal funding and, " 'although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees.' " Pet. App. 30a (quoting Pl.'s Opp. Br. 6).

---

[4] Smith also alleged that the NCAA's postbaccalaureate rule violates federal antitrust laws. The Court of Appeals affirmed dismissal of this claim, *see* Pet. App. 5a-12a, and this Court denied Smith's petition for certiorari seeking review of that ruling. No. 98-107 (Oct. 5, 1998). In addition, Smith brought a state law breach of contract claim; the District Court, however, declined to exercise supplemental jurisdiction over that claim after dismissing the federal counts. Pet. App. 34a.

The District Court dismissed Smith's complaint for failure to state a claim upon which relief could be granted. *Id.* 33a. The court agreed with the NCAA that Smith had failed adequately to allege that the NCAA is a recipient of federal financial assistance, the statutory predicate to Title IX coverage. *Id.* 31a. It further held that Smith "failed to state a claim under Title IX," even assuming that the NCAA's member institutions receive federal funds and such "funding may ultimately be paid from the member institution[s] to the NCAA in membership dues or other fees." *Id.* 32a. Such a " 'connection[]' with federal funding," the court explained, is "too far attenuated to qualify [the NCAA] as a recipient of federal funds thus subjected to the mandates of Title IX." *Id.*

Shortly after the District Court entered its order dismissing Smith's Title IX claim, Smith sought leave to amend her complaint to allege that " '[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance.' " *Id.* 18a (quoting amended complaint).[5] But having already concluded that the "connection" by which Smith sought to prove that the NCAA was an indirect recipient of federal funds was too attenuated to trigger Title IX, the District Court denied Smith leave to amend. *Id.* 36a. Smith appealed.

The Third Circuit reinstated Smith's Title IX claim. According to the Court of Appeals, the District Court should have allowed the claim to proceed because Smith's proposed amendment "alleges that the NCAA receives dues from member institutions, which receive federal

---

[5] The amended complaint also sought to add Hofstra and the University of Pittsburgh as defendants, and alleged that they are direct recipients of federal financial assistance and "enforced the decision to deny [Smith] eligibility." Am. Compl. ¶¶ 66-69.

funds." *Id.* 19a. "[T]his allegation," the court held, "would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss." *Id.*

In so holding, the Court of Appeals recognized that this Court had held in *Paralyzed Veterans* that Section 504 does *not* extend to entities which simply benefit from—as opposed to receive—federal aid, and also recognized that Section 504 "contains language *identical* to that of Title IX * * * regarding receipt of federal assistance." Pet. App. 14a (emphasis added). "Notwithstanding the parallel language of [Section 504] and Title IX," however, the Third Circuit declined to "apply the *Paralyzed Veterans* Court's definition of 'recipient' to Title IX." Pet. App. 15a. The sole reason the court gave for departing from *Paralyzed Veterans* was that the Title IX regulations "define[] a recipient as an entity 'which operates an educational program or activity which *receives or benefits*' from federal funds." *Id.* (quoting 34 C.F.R. § 106.2(h)) (emphasis in Court of Appeals opinion). That regulatory definition, the Third Circuit held, "require[d]" it to "reach a different result." *Id.*

Based on that reasoning, the Court of Appeals held that the fact "that the NCAA receives dues from its members which receive federal funds * * * would subject the NCAA to the requirements of Title IX," and accordingly ruled that Smith was entitled to proceed with her Title IX claim against the NCAA. *Id.* 16a. The Third Circuit denied the NCAA's petition for rehearing. *Id.* 39a. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The Third Circuit erred in holding that the NCAA is subject to Title IX because it receives payments from entities that receive federal financial assistance. The language, purpose, and "contractual nature" of Title IX as Spending Clause legislation plainly limit the statute's

reach to recipients of federal financial assistance. *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 118 S. Ct. at 1997-98. In *Paralyzed Veterans* this Court accordingly rejected the notion that federal coverage "follows the aid past the recipient to those who merely benefit from the aid." 477 U.S. at 607. Because the NCAA at most only indirectly benefits—in the form of dues—from the federal financial assistance received by others, it is not covered by Title IX. Nothing in the Title IX regulations compels a different conclusion and, in any event, those regulations may not be invoked to override the clear intent of Congress to limit federal coverage to recipients, or to circumvent this Court's decisions.

II. Nor is the NCAA covered by Title IX on the basis of its "relationship" with member institutions that are, as Smith has also argued. This Court already has repudiated the argument that entities may be covered by Title IX, "not because they had received federal financial assistance, but because they are 'inextricably intertwined' with an institution that has." *Paralyzed Veterans*, 477 U.S. at 610. Just last Term, moreover, the Court recognized that Title IX does not incorporate agency or vicarious liability principles. *Gebser*, 118 S. Ct. at 1996, 1999. That holding is compelled by Title IX's origin as Spending Clause legislation, and precludes extension of Title IX to the NCAA on the basis of any agency relationship it may have with members. Subsequent congressional action as well as agency interpretation of Title IX provides still more evidence that coverage does not extend to private entities—including private athletic associations—that do not themselves receive federal financial assistance, even if their members do.

III. Affirming the Third Circuit decision on either of these grounds would have broad implications beyond the NCAA and Title IX. Hundreds if not thousands of private membership organizations and associations receive no federal aid, but have members that do. If the NCAA

is covered by Title IX on the basis of its relationship with its members, all these entities would be subject to claims that they, too, are vicariously covered, regardless of whether they voluntarily and knowingly accepted coverage in exchange for federal aid. If, as the Third Circuit held, receipt of nominal payments from a federal funding recipient is sufficient to trigger coverage, then the implications of this case would be even broader: "the statutory 'limitation' on [federal] coverage would virtually disappear." *Paralyzed Veterans*, 477 U.S. at 609. Congress surely did not intend the program-specific statutes to reach this far, and as Spending Clause legislation they cannot.

ARGUMENT

I. THE NCAA IS NOT COVERED BY TITLE IX ON THE BASIS OF ITS RECEIPT OF PAYMENTS FROM ENTITIES THAT RECEIVE FEDERAL FINANCIAL ASSISTANCE.

A. The Language, Purpose, And Origin Of Title IX Limit Coverage To Recipients Of Federal Financial Assistance.

As with any statute, the starting point in determining the scope of Title IX is the language of the statute itself. *See Ardestani* v. *INS*, 502 U.S. 129, 135 (1991); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 520 (1982). Title IX prohibits discrimination "on the basis of sex * * * under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). "[P]rogram or activity" is defined elsewhere in the statute to include the operations of certain government, education, and other entities. *See id.* § 1687, discussed *infra* at 30-31. But to come within Title IX's ambit, a covered program or activity must under the plain terms of the statute "receiv[e] Federal financial assistance." *Id.* § 1681(a). "At the outset, therefore, [the statute] requires [the Court] to identify the *recipient* of the federal assistance." *Paralyzed Veterans*, 477 U.S. at 604 (emphasis added).

This Court has consistently interpreted Title IX to mean what it says. *See Gebser*, 118 S. Ct. at 1997 ("Title IX focuses on * * * discriminatory practices carried out by recipients of federal funds."); *Grove City College* v. *Bell*, 465 U.S. 555, 570 n.20 (1984) ("Title IX coverage is triggered only when an 'education program or activity' is receiving federal aid."); *id.* at 577 (Title IX "make[s] unlawful 'discrimination' by recipients of federal financial assistance") (Powell, J., joined by Burger, C.J., and O'Connor, J., concurring); *Cannon v. University of Chicago*, 441 U.S. 677, 695 n.17 (1979) ("Title IX is applicable only to certain educational institutions receiving federal financial assistance"); *accord North Haven Bd. of Educ.*, 456 U.S. at 520-521. *Cf. Paralyzed Veterans*, 477 U.S. at 605 ("Congress limited the scope of § 504 [which has the same federal funding trigger as Title IX] to those who actually 'receive' federal financial assistance"). So have the lower courts. *See, e.g., Smith* v. *Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1018 (7th Cir. 1997) ("only a grant recipient can violate Title IX") (citing cases), *cert. denied*, 118 S. Ct. 2367 (1998); Pet. 17-20.

This plain meaning interpretation accords with other provisions of the statute, notably Title IX's enforcement provision. Section 1682 makes the "ultimate sanction for noncompliance" with Title IX "termination of federal funds or denial of future grants." *North Haven Bd. of Educ.*, 456 U.S. at 514-515. That sanction is meaningless unless the subject is a federal funding recipient to begin with. The interpretation also squares with one of the basic purposes of Title IX: " 'to avoid the use of *federal resources* to support discriminatory practices.' " *Gebser*, 118 S. Ct. at 1997 (quoting *Cannon*, 441 U.S. at 704) (emphasis added). And it comports with the statute's relatively sparse legislative history. *See* 118 Cong. Rec. 5803 (Feb. 28, 1972) ("heart" of Title IX is prohibition on "sex discrimination in educational programs receiving federal funds") (Sen. Bayh); *id.* at 5803-

15 (discussing discriminatory practices of institutions that clearly receive federal funds) (various members).[6]

This plain reading comes as no surprise; given its origin, Title IX could extend no further. As this Court resolved last Term, Title IX—like Title VI, the statute on which it was modeled—was enacted pursuant to Congress' spending power. *Gebser*, 118 S. Ct. at 1998. As Spending Clause legislation, Title IX "is not a regulatory measure, but an exercise of the unquestioned power of the Federal government to fix the terms on which Federal funds shall be disbursed." *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582, 599 (1983) (quotation omitted). Title IX thus "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser*, 118 S. Ct. at 1997. That "contractual framework," *id.*—the essence of Spending Clause legislation—limits Title IX's reach to entities that voluntarily and knowingly accept this "offer," *i.e.*, the actual recipients of federal aid. *See Pennhurst State Sch. & Hosp.* v. *Haldeman*, 451 U.S. 1, 17 (1981) (under Spending Clause, conditions on recipient of federal funds must allow contracting parties "to exercise their choice knowingly, cognizant of the consequences of their participation").

Because the NCAA does not itself receive federal financial assistance, it has never entered into the Title IX contract and accordingly is beyond the statute's intended and constitutionally permissible reach. The Third Circuit

[6] Title IX originated as a floor amendment to the Higher Education Amendments of 1972. "Senator Bayh's statements—which were made on the same day the amendment was passed, and some of which were prepared rather than spontaneous remarks—are [viewed as] the only authoritative indications of congressional intent regarding the scope of [Title IX]." *North Haven Bd. of Educ.*, 456 U.S. at 526-527.

sought to circumvent that conclusion by characterizing the NCAA as "a recipient of federal funds" on the basis of its receipt of "dues from member institutions, which receive federal funds." Pet. App. 19a. As we explain next, however, that reasoning defies the intent and purpose of Title IX's federal funding trigger, and was flatly rejected by this Court in *Paralyzed Veterans*.[7]

B. Title IX Does Not Extend To Entities That Merely Benefit From The Receipt Of Federal Financial Assistance By Others.

The question in *Paralyzed Veterans* was whether Section 504 of the Rehabilitation Act—which prohibits discrimination against disabled persons in any program or activity "receiving Federal financial assistance," 29 U.S.C. § 794—applies to commercial airlines. Airlines do not

[7] In her brief in opposition to certiorari, Smith asserted—as "an alternative basis for holding the NCAA subject to Title IX"—that an amicus brief filed in the Court of Appeals had argued that the NCAA is a "direct federal funding" recipient on the basis of a federal grant to the "National Youth Sports Program," a Missouri corporation, not the NCAA. Opp. 6. As we explained in our reply, however, the Court of Appeals does not consider issues raised only by amici. Reply to Opp. 4 n.3. In *her* Court of Appeals brief (p. 6), Smith asserted for the first time that the NCAA receives federal funds *indirectly* through the NYSP. But the Third Circuit "has consistently held that it will not consider issues that are raised for the first time on appeal," *Harris* v. *City of Philadelphia*, 35 F.3d 840, 845 (3d Cir. 1994), did not consider any argument involving the NYSP, and, in fact, it—like the District Court—never even alluded to the NYSP. Instead, the Court of Appeals held that the NCAA is subject to Title IX because it "receives dues from member institutions, which receive federal funds." Pet. App. 16a, 19a. The propriety of that ruling is the question on which this Court granted certiorari, Pet. i, and until or unless the Third Circuit decision below is set aside, there is no reason to consider any "alternative basis for holding the NCAA subject to Title IX." Opp. 7 n.2. *See Perry* v. *Thomas*, 482 U.S. 483, 492 (1987) ("alternative ground * * * does not prevent us from reviewing the ground exclusively relied upon by the courts below"); cases cited at Reply to Opp. 4 n.3.

receive federal aid, but airport operators do. 477 U.S. at 604-605. In arguing that Section 504 covers airlines, the plaintiffs in *Paralyzed Veterans* reasoned that "airlines are 'indirect recipients' of the aid to airports," because "airport operators convert the [aid] into runways and give the federal assistance—now in the form of a runway—to the airlines." *Id.* at 606. This Court disagreed, holding that "Section 504, *like Title IX* * * *, draws the line of federal regulatory coverage between the recipient and the beneficiary," and accordingly "covers those who receive the aid, but does not extend as far as those who benefit from it." *Id.* at 607, 610 (emphasis added).

The Third Circuit rationale for extending Title IX to the NCAA is foreclosed by *Paralyzed Veterans.* As this Court recognized in *Paralyzed Veterans,* Title IX and Section 504 contain the identical federal funding trigger, which is modeled on and has the same meaning as Title VI's trigger. *Id.* at 610.[8] Like the airlines in *Paralyzed Veterans,* the NCAA does not itself receive federal aid, and—at most—only indirectly benefits from aid received by members in the form of dues. Thus, under the rule of *Paralyzed Veterans,* the NCAA is—at most—an indirect beneficiary beyond Title IX's reach. The Third Circuit's

[8] *Paralyzed Veterans* expressly equates Section 504 with the other "program-specific statutes," including "Title IX," insofar as the federal funding trigger is concerned. 477 U.S. at 605. *See also Consolidated Rail Corp.* v. *Darrone,* 465 U.S. 624 (1984) (looking to prior interpretation of Title IX in construing identical language in Section 504). Numerous lower courts have recognized that the identical language in these laws has the same meaning. *See, e.g., United States* v. *Alabama,* 828 F.2d 1532, 1548 n.63 (11th Cir. 1987) ("Title IX * * * and section 504 of the Rehabilitation Act of 1973 were modeled after title VI and contain identical language. The Supreme Court has assumed the meaning of this program-specific language to be the *same* for all three statutes.") (emphasis added) (citing Supreme Court precedent), *cert. denied,* 487 U.S. 1210 (1988); *Doe* v. *Attorney General of United States,* 941 F.2d 780, 794 (9th Cir 1991); *Foss* v. *City of Chicago,* 817 F.2d 34, 36 n.1 (7th Cir. 1987). Smith does not assert otherwise.

contrary ruling violates the central teaching of *Paralyzed Veterans*: that federal coverage does not "follow[] the aid past the recipient to those who merely benefit from the aid." *Id.* at 607.

Smith claims that the fact that "the NCAA actually receives money from its federally funded member institutions in the form of dues * * * distinguishes this case from *Paralyzed Veterans,*" because airlines indirectly benefit from federal assistance only in the form of " 'non-money grants.' " Opp. 5-6 (quoting 477 U.S. at 606). But in *Paralyzed Veterans,* this Court specifically recognized that "federal financial assistance may take non-money form." 477 U.S. at 607-608 n.11. Thus, the pertinent inquiry in determining whether federal coverage exists is *not* whether the entity indirectly benefits in the form of money or nonmoney assistance, but rather—as the *Paralyzed Veterans* Court made clear in distinguishing *Grove City College* v. *Bell, supra*—whether the indirect beneficiary is an "intended recipient" of the aid in question. 477 U.S. at 607; *see id.* at 608 n.11.

In *Grove City* this Court held that colleges are covered by Title IX by virtue of their students' receipt of federal tuition grants. That holding, however, was explicitly based on "powerful evidence of Congress' intent" that colleges and universities are in fact the *intended* recipients of this aid, 465 U.S. at 569, including the "stated purpose[] of the student aid provisions * * * to 'provid[e] assistance to institutions of higher education.' " *Id.* at 566 (quoting statute); *see id.* at 565-570 (reviewing legislative record). Indeed, in light of this unmistakable legislative intent, the Department of Education requires colleges whose students receive financial aid to execute assurances—in the form of a contract—accepting federal coverage under Title IX. *Id.* at 560. *Grove City* simply stands for the proposition that an indirect *recipient* may be covered by Title IX when it is clear that Congress views that entity as a recipient of the financial aid.

This Court confirmed that reading of *Grove City* in *Paralyzed Veterans*, when it rejected essentially the same interpretation of *Grove City* advanced by Smith here:

> [Plaintiffs] also find support for their position in *Grove City*'s recognition that federal financial assistance could be either direct or indirect. This argument confuses intended *beneficiaries* with intended *recipients*. * * * While *Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid. [*Paralyzed Veterans*, 477 U.S. at 606-607 (emphasis in original).[9]]

In *Paralyzed Veterans* it was "clear that the [intended] recipients of the federal assistance extended by Congress under the [Airport] Trust Fund are the airport operators." *Id.* at 607. Thus, federal coverage began and ended with the operators; it did not "follow[] the aid past the [operators] to those who merely benefit from the aid." *Id.* Here, it is clear that the intended recipients of the federal aid in question—federal grants and other assistance programs available to colleges and universities, *see* note 2, *supra*—are the institutions that in fact receive the aid, and execute assurances agreeing to be covered. Indeed, in this case as in *Paralyzed Veterans*, there is no claim that *Congress* actually intended the alleged indirect beneficiary—here, the NCAA—to receive the money disbursed to other entities. 477 U.S. at 607.

[9] The *Grove City* Court went on to hold that a recipient's obligation to comply with Title IX extends only to the particular program or activity receiving federal aid; *e.g.*, in the case of Grove City College, the student financial aid program. 465 U.S. at 574. In 1987 Congress amended Title IX to establish coverage on an institution-wide rather than program-specific basis. *See* Civil Rights Restoration Act of 1987 ("CRRA"), codified in pertinent part at 20 U.S.C. § 1687. In doing so, however, Congress made clear that the CRRA left undisturbed the existing federal funding trigger—as interpreted in *Paralyzed Veterans*—for determining when an entity is covered in the first place. *See* S. Rep. No. 100-64, at 31 (1987) (CRRA does "not change in any way who is a recipient of federal financial assistance," and "does not overrule or alter the Supreme Court ruling in [*Paralyzed Veterans*]."); 55 Fed. Reg. 52136, 52138 (Dec. 19, 1990) (same); *infra* at 31-32.

In rejecting the indirect beneficiary rationale in *Paralyzed Veterans*, this Court recognized that Congress intended coverage under the program-specific statutes to be premised on the contract between the government and the intended recipient. As Justice Powell wrote for the Court, "[u]nder the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipients' acceptance of the funds triggers coverage under the non-discrimination provision." 477 U.S. at 605. That is a *"quid pro quo* for the receipt of federal funds." *Id.* (quotation omitted). The Third Circuit decision disregards this fundamental contractual—and constitutionally grounded—limitation on Title IX's reach and, instead, gives the statute "almost limitless coverage." *Id.* at 608.

"Title IX's contractual nature" was the underpinning for this Court's decision last Term in *Gebser* v. *Lago Vista Independent School District*, 118 S. Ct. at 1998. In *Gebser* the Court held that a school district may not be held liable under Title IX for the acts of its teachers unless it "has actual notice of * * * the teacher's misconduct." *Id.* at 1993. In so holding, the Court emphasized that Title IX's "contractual framework" prohibits a court from imposing liability where "the receiving entity of federal funds [lacks] notice that it will be liable for a monetary award" for the acts in question. *Id.* at 1997, 1998 (quotation omitted). Extending federal coverage to entities that merely indirectly benefit from the federal aid received by others would obliterate this fundamental notice requirement because such indirect beneficiaries have

no reason to know they are covered; indeed, they are in no "position to accept or reject [the Title IX contract] as part of the decision whether or not to 'receive' federal funds." *Paralyzed Veterans*, 477 U.S. at 608.

Lack of notice is a basic constitutional impediment to Smith's position in this case. "The legitimacy of Congress' power to legislate under the spending power * * * rests on whether [the recipient of federal aid] voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a [recipient] is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst State School & Hosp.*, 451 U.S. at 17 (citations omitted). To satisfy this constitutional prerequisite, the Title IX regulations provide that every recipient of federal financial assistance must execute a written assurance agreeing to comply with Title IX. 34 C.F.R. § 106.4. The NCAA has never executed any such assurance on the basis of federal aid received by colleges and universities, or the NCAA's receipt of membership dues. In other words, like the airlines in *Paralyzed Veterans*, the NCAA never knowingly or voluntarily accepted the terms of the Spending Clause contract, and accordingly is not covered by Title IX.[10]

---

[10] Other courts have faithfully applied this Court's decision in *Paralyzed Veterans* and limited the reach of the program-specific statutes to recipients of federal financial assistance. Thus, for example, in *Grzan* v. *Charter Hospital of Northwest Indiana*, 104 F.3d 116, 119-120 (7th Cir. 1997), the Seventh Circuit held that Section 504 does not cover employees of a direct recipient of federal aid, even though they receive payments—in the form of wages—from a federal funding recipient. In reaching this result, the Seventh Circuit specifically relied on *Paralyzed Veterans* for the proposition that "benefiting from a federally financed program, *even where the benefits are financial*, does not necessarily constitute the receipt of federal funding." *Id.* at 120 (emphasis added).

Gallagher v. *Croghan Colonial Bank*, 89 F.3d 275 (6th Cir. 1996), is to the same effect. The plaintiff in that case argued that a bank was subject to Section 504 because, although not a direct recipient of federal financial assistance, the bank "makes student loans which are subsidized and guaranteed with federal funds." *Id.* at 277. Following *Paralyzed Veterans*, the Sixth Circuit affirmed the dismissal of this claim on the ground that the bank was not covered by Section 504. As the court explained, federal coverage "does not follow federal aid past the intended recipient to those who merely derive a benefit from the aid or receive compensation for services rendered pursuant to a contractual arrangement." *Id.* at 278 (quotation omitted). *But see Moore* v. *Sun Bank*, 923 F.2d 1423, 1432 (11th Cir. 1991) (banks receiving federal default reimbursements on federally guaranteed loans are covered by Section 504).

C. The Title IX Regulations Provide No Basis For Disregarding The Clear Intent Of Congress Or Plain Import Of This Court's Decisions.

Although the Third Circuit recognized that Title IX contains the identical federal funding trigger as Section 504, it chose "not [to] apply the *Paralyzed Veterans* Court's definition of 'recipient' to Title IX" because it believed that an administrative regulation under Title IX compelled a different result. Pet. App. 15a. As the Court of Appeals put it, "the broad regulatory language under Title IX * * * defines a recipient as an entity 'which operates an educational program or activity which *receives or benefits*' from federal funds." *Id.* (quoting 34 C.F.R. § 106.2(h)) (emphasis in opinion).

The Third Circuit, however, omitted the pertinent and critical part of the regulatory definition—the clause immediately preceding the one it quoted in explaining its refusal to follow *Paralyzed Veterans*. In full, the Title IX regulations define "recipient" to include

> any public or private agency, institution or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient *and* which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee thereof. [34 C.F.R. § 106.2(h) (emphasis added).]

Contrary to the supposition of the Court of Appeals, it is not enough—even under the regulatory definition on which the Third Circuit relied to flank *Paralyzed Veterans*—that an entity "operates an education program or activity which receives or benefits from" federal funds for that entity to be covered under Title IX. *Id.* Instead, as the italicized "and" in the quoted text above unambiguously confirms, the entity itself must *also* be one "to whom Federal financial assistance is extended directly or through another recipient." *Id.* That of course is the issue in this case, and that issue is controlled by this Court's decision in *Paralyzed Veterans*.

The fact that the regulations contemplate the receipt of federal funds "through another recipient" simply reflects the lesson of *Grove City*: "Title IX coverage extends to Congress' *intended* recipient, whether receiving the aid directly or indirectly." *Paralyzed Veterans*, 477 U.S. at 607 (emphasis added) (explaining *Grove City*). While "[i]t was clear in *Grove City* that Congress' intended recipient was the college," *id.* at 606-607, there is no indication (or assertion) that the NCAA is the intended recipient of the federal aid disbursed to colleges, nearly all of which is earmarked for non-athletic uses such as student aid and scientific research. In *Grove City*, moreover, it was evident that students were acting as "mere conduits of the aid to its intended recipient." *Id.* at 607. Colleges and universities, by contrast, in no way act as "mere conduits" for funneling federal money to the NCAA; indeed, doing so would doubtless violate the terms on which the aid was extended to the *institutions*.[11]

---

11 *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996), further illustrates the narrow circumstances in which the indirect receipt of federal aid may trigger coverage. In that case, the Sixth Circuit held that a railroad was subject to Section 504, where the railroad "receives government money for the improvement of railroad crossings," which it then "owns." *Id.* at 786-787. The railroad argued that under *Paralyzed Veterans* federal law was not triggered because, pursuant to the federal grant program at issue, funds are distributed first to the states and then to railroads. *Id.* at 787. But, as the Sixth Circuit explained, the railroads were plainly the intended recipients of the federal funds and, thus, were required to execute "an express promise to comply with the nondiscrimination regulations for federally assisted programs." *Id. Cf. Bentley* v. *Cleveland Cty. Bd. of Cty. Comm'rs*, 41 F.3d 600, 604 (10th Cir. 1994) (county's receipt of federal funds from state government triggered Section 504); *Dunlap* v. *Association of Bay Area Gov'ts*, 996 F. Supp. 962, 968 (N.D. Cal. 1998) ("An entity has been held to be an 'indirect recipient' only where that entity received funding that was funneled from the federal government through the state") (quoting *Paralyzed Veterans*, 477 U.S. at 609).

Nor does the regulation's "or benefits from" language supply any basis for subjecting the NCAA to Title IX. That language was adopted before this Court's decision in *Paralyzed Veterans* and must be read in light of this Court's holding in that case: Title IX and the other program-specific statutes "cover[] those who receive the aid, but do[] not extend as far as those who *benefit* from it." 477 U.S. at 607 (emphasis added). Thus, whatever the continuing effect of the "benefits from" language in the Title IX regulations, it does not bring within Title IX entities such as the airlines in *Paralyzed Veterans* or the NCAA here that only indirectly benefit (if at all) from federal aid received by others.

In the wake of *Paralyzed Veterans*, affected agencies duly amended their Section 504 regulations to "delete[] the phrase 'or benefiting from' [federal financial assistance]." 55 Fed. Reg. at 52138. As they explained, this change was necessitated by *Paralyzed Veterans*, "which held that air transportation services provided by airlines were not part of the covered program or activity because the airlines were not the intended recipient of the Federal financial assistance to airports, even if airlines benefited from that assistance." *Id.* The parallel "or benefits from" language was not deleted from the corresponding Title IX regulations (*i.e.*, 34 C.F.R. § 106.2(h)), but the Third

Circuit erred in giving effect to that vestigial language in an effort to bypass this Court's interpretation of the identical federal funding trigger in *Paralyzed Veterans*.

The Third Circuit's reliance on the regulation's definition of recipient to disregard "the *Paralyzed Veterans* Court's definition of 'recipient' " was error for an even more basic reason. Pet. App. 15a. The Third Circuit refused to heed the rule of *Paralyzed Veterans* because, in its view, doing so would render the Title IX regulation a "nullity." *Id.* 16a. But regulations fall if they are inconsistent with Supreme Court precedent, not the other way around. In *Paralyzed Veterans* this Court construed what the Third Circuit itself acknowledged was statutory "language identical to that of Title IX," contained in a statute (Section 504) modeled on the same provision as Title IX —*i.e.*, Title VI. Pet. App. 14a. That statutory interpretation was binding on the Third Circuit, just as it is binding on the agency charged with administering Title IX. *See Neal* v. *United States*, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.").

II. THE NCAA IS NOT COVERED BY TITLE IX ON THE BASIS OF ITS RELATIONSHIP WITH MEMBER INSTITUTIONS THAT ARE.

As an alternative ground for circumventing *Paralyzed Veterans* and affirming the Third Circuit decision, Smith argues that the NCAA is covered by Title IX on the basis of the "*relationship* between the NCAA and its member institutions." Opp. 9 (emphasis added). This argument is different from the indirect beneficiary rationale relied upon by the Third Circuit, because it does not depend on the NCAA's receipt of payments from a federal funding recipient, in the form of dues or otherwise. Instead, the argument is based on the quite different notion that because most colleges and universities are covered by Title IX, the NCAA—due to its "relationship" with those institutions—must be vicariously covered, too. For several reasons, this argument also fails.

A. The NCAA Is No Mere "Surrogate" For Its Members.

To begin with, the argument's central factual premise is unfounded. Smith claims that "[t]here is no real distinction between the NCAA and its member institutions," and that the NCAA is merely a "surrogate" for its members. Opp. 9. But the NCAA constitution draws clear lines between the organization and member institutions. Thus, while the constitution authorizes the organization to adopt rules governing intercollegiate athletics, it states that "[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself." NCAA const. art. 6.01.1. As courts have recognized, moreover, "[t]he NCAA's interests are * * * not coterminous with or identical to the broader interests of all or any of its institutional members." *NCAA v. Califano*, 444 F. Supp. 425, 433 (D. Kan. 1978), *rev'd on other grounds*, 622 F.2d 1382 (10th Cir. 1980); *see* Pet. 21 n.13.

The NCAA's mission obviously relates to that of its members, at least insofar as intercollegiate athletics is concerned. But the NCAA acts foremost with *its* distinct mission in mind—"maintenance of [the] revered tradition of amateurism in college sports." *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. at 120. As a result, the NCAA often adopts rules that are opposed by individual institutions, and is required to take enforcement actions over the opposition of individual members, for the collective good. The *Tarkanian* case vividly illustrates the point; there, this Court aptly characterized the NCAA and one of its members as "antagonists, not joint partici-

pants." 488 U.S. at 197 n.16. The duty of the NCAA is to "serve[] the common need of member institutions for regulation of athletics while correlating their diverse interests." *Arlosoroff* v. *NCAA*, 746 F.2d at 1022. In attempting to fulfill that duty in the increasingly complex world of intercollegiate athletics, the NCAA is by no means a mere "surrogate" for its members.

B. *Paralyzed Veterans* Repudiates The "Relationship" Rationale For Extending Federal Coverage Beyond Recipients Of Federal Financial Assistance.

In any event, this Court has already repudiated the relationship rationale for extending federal coverage. In *Paralyzed Veterans* the Court squarely rejected the argument—directly analogous to the one Smith advances here—that the airlines were covered by Section 504, "not because they had received federal financial assistance, but because they are 'inextricably intertwined' with an institution that has." 477 U.S. at 610. *See Dunlap* v. *Association of Bay Area Govt's*, 996 F. Supp. at 968 (entities "that are 'inextricably intertwined' with actual recipients, are *not* on that basis covered") (citing *Paralyzed Veterans*, 477 U.S. at 607-610; emphasis added).[12] As the *Paralyzed Veterans* Court put it, this reasoning is "overbroad and unpersuasive." 477 U.S. at 160. It is no more availing today than it was back then.

Compelling jurisprudential considerations support this Court's ruling. As this Court has recognized, threshold jurisdictional determinations—such as whether a particular entity or program is covered by the program-specific

[12] In *Paralyzed Veterans* the plaintiffs argued that airlines are "inextricably intertwined" with airports, and that the "indissoluble nexus" between them is "commercial air transportation." 477 U.S. at 610. The argument in this case is that the NCAA is inextricably intertwined with member institutions, and that the indissoluble nexus between them is intercollegiate athletics.

antidiscrimination laws—should not depend upon fact-specific inquiries that are "hard to apply," "jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invite[] complex argument in a trial court and a virtually inevitable appeal." *Grubart* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). *Accord Sisson* v. *Ruby*, 497 U.S. 358, 364 n.2 (1990); *Burnham* v. *Superior Court of Cal.*, 495 U.S. 604, 626 (1990) (plurality opinion). The relationship approach to the federal coverage determination under Title IX suffers from each of these flaws.

Indeed, the difficulty that courts have experienced in determining whether the NCAA is a state actor due to its relationship with members that are state agents bespeaks the complexity and unpredictability of this undertaking. *See NCAA* v. *Tarkanian*, 488 U.S. at 182 n.5 (detailing lower court struggle).[13] The potential permutations on this theme are myriad. Scores of associations and other entities—most or all of which are distinguishable from one another in some respect relating to organizational form, internal relations, or membership—are affiliated with higher education entities that receive federal funds, but do not themselves receive federal aid. *See* Appendix, *infra*. Determining whether these entities are covered by the program-specific laws under the "relationship" rationale would require the development of an entirely new

[13] In *Tarkanian* this Court held that the NCAA was not a state actor for purposes of its investigation and enforcement action against the basketball coach at one particular state school. In doing so, it reversed a state high court ruling that the NCAA is a state actor, which was based in part on the premise that because "'many NCAA member institutions were either public or government supported,'" the NCAA must be a public entity, too. 488 U.S. at 190 (quoting lower court decision). As the *Tarkanian* Court recognized, the lower courts are split on whether the NCAA is a state actor for general purposes. *Id.* at 182 n.5. There is no claim in this case that the NCAA is a state actor.

jurisprudence concerning what is a sufficient inter-relationship to trigger federal coverage. At the end of the day, that determination would no doubt turn on the facts and circumstances of the alleged relationship in each particular case. There is no inkling that Congress intended to subject the federal coverage determination to such a cumbersome and unpredictable regime.

All indications are to the contrary. As discussed, the language, purpose, and origin of Title IX and the other program-specific statutes make clear that Congress intended to link coverage to the receipt of federal funding. That determination should always be straightforward because recipients of federal funding—even intended recipients that receive funding through another entity, such as the college in *Grove City*—must execute a written assurance accepting coverage. *See* 34 C.F.R. § 106.4; *supra* at 16. That assurance is vital because "[t]he legitimacy of Congress' power to legislate under the spending power * * * rests on whether [the recipient] voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State School & Hosp.*, 451 U.S. at 17 (citations omitted). An indeterminate relationship approach would extend federal coverage on an ad hoc basis to entities that have never "voluntarily and knowingly" entered into a Spending Clause contract, in clear conflict with Congress' intent in enacting Title IX and this Court's Spending Clause jurisprudence.

C. Title IX Coverage May Not Be Extended On The Basis Of Agency Or Vicarious Liability Principles.

Smith attempts to distinguish *Paralyzed Veterans* by arguing that the NCAA is "an agent of its member institutions," Opp. 7, whereas "[t]he airlines in [*Paralyzed Veterans*] were not agents of the airport." *Id.* 9. Neither the alleged relationship in this case nor the one in *Paralyzed Veterans* is readily pigeonholed as a matter of agency law. But even if this asserted distinction were

valid, it would make no difference with respect to the coverage determination under Title IX. Indeed, just last Term this Court rejected the argument that Title IX liability may be expanded by "application of agency principles." *Gebser*, 118 S. Ct. 1996, 1999.[14] The question in *Gebser* was whether a federal funding recipient is liable under Title IX for acts of its agents (in *Gebser*, a teacher). The Court answered this question in the negative, holding that—in view of Title IX's "contractual nature"—Title IX liability may not be expanded "on principles of vicarious liability." *Id.* at 1997-98.

If the liability of an entity plainly covered by Title IX may not be enlarged on the basis of agency or vicarious liability principles, then surely those principles may not be invoked to extend Title IX to entities not covered in the first place. Indeed, if the NCAA were properly viewed as an "agent" of its members, then its relationship with federal funding recipients would at most be akin to that between the institution defendant and teacher in *Gebser*.[15]

---

[14] The petitioners in *Gebser*—supported by the United States as amicus curiae—argued that Title IX incorporates the same principles of agency law developed under Title VII. *See* Pet. Br. in No. 96-1866, at 15-17; U.S. Br. in No. 96-1866, at 9 ("Agency principles apply in Title IX cases in much the same manner as in Title VII cases"); *id.* 12-18 (same). This argument was based in part on the premise that Title IX, like Title VII, was enacted pursuant to Section 5 of the Fourteenth Amendment, not the Spending Clause. *See* U.S. Br. 23 n.16. In *Gebser*, however, this Court resolved any doubt that Title IX was enacted pursuant to Congress' spending power, and held that Title IX's "contractual framework distinguishes [it] from Title VII." 118 S. Ct. at 1997. In addition, the Court explained that because Title IX, unlike Title VII, contains no reference to "agents," there is no statutory basis for importing agency principles into Title IX. *See id.* at 1995-96.

[15] In *Gebser* the United States argued that the teacher was an agent of and "'stands in the shoes' of the school." U.S. Br. in No. 96-1866, at 14 (quoting administrative policy guidance). Here, Smith argues that the NCAA is an agent of and "stands in the shoes of its member institutions." Opp. 8 n.4.

As the vast majority of courts have recognized, however, Title IX provides no right of action against employees or other agents of federal funding recipients. *See Smith* v. *Metropolitan Sch. Dist.*, 128 F.3d at 1018-19 & n.1 (collecting cases); note 10, *supra*. That conclusion is compelled by the clear intent of Congress to limit Title IX coverage to recipients, and is unassailable in the wake of this Court's ruling in *Gebser* that Title IX does not incorporate agency or vicarious liability principles. It precludes extension of Title IX to the NCAA on the basis of any agency theory derived from its relationship with members that receive federal aid.

D. Subsequent Legislative Activity Confirms That Title IX Does Not Cover Private Entities On The Basis Of A Member's Receipt Of Federal Financial Assistance.

Subsequent legislative activity provides further evidence that Title IX does not cover private organizations on the basis of a member's receipt of federal aid. In 1984, for example, Senator Kennedy introduced a bill (S. 2568) that would have amended Title IX and the other program-specific statutes by deleting the term "program or activity" and replacing it with "recipient," which the bill defined as:

> any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit [thereof]) * * * to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits. [130 Cong. Rec. S9258 (Apr. 12, 1984).]

S. 2568's stated purpose was to overturn this Court's holding in *Grove City* that Title IX only applies to the specific "program or activity" receiving federal assistance, not institution-wide. *Id.* S9265. But the bill was tabled

after members of Congress, the Department of Justice ("DOJ"), and private groups voiced concerns that the bill—and particularly its open-ended recipient language—"goes far beyond title IX law prior to [*Grove City*]," and "extends coverage for the first time to State and local entities that actually receive no Federal financial assistance." *Id.* S27465, S274479 (Sept. 27, 1984) (Sen. Hatch); *id.* 27467 (DOJ statement). *See* 130 Cong. Rec. S27466 (Sept. 27, 1984) ("The definition of 'recipient' in S. 2568 is unclear and could extend the reach of the [program-specific] statutes to an organization which does not itself receive federal financial assistance.") (U.S. Catholic Conference).[16] The rejection of S. 2568 "militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199-200 (1974).

In 1987 Congress passed the CRRA, Pub. L. No. 100-259, codified in pertinent part at 20 U.S.C. § 1687. The CRRA was a direct response to *Grove City*, and thus took a "very different" approach from that of S. 2568.

---

[16] *See also* 130 Cong. Rec. S27466 (Sept. 27, 1984) ("We are concerned that the proposed legislation may extend the force and coverage of the civil rights laws far beyond their original scope.") (excerpt of statement from the National Association of Counties); *id.* (S. 2568 has "utter disregard * * * for the lines that have traditionally marked the boundaries between the public and private sectors") (National Association of Independent Colleges and Universities); *id.* S27467 ("The 'recipient' definition's reliance on an indirect benefit theory brings within its reach every imaginable kind of private or local governmental activity.") (American Association of Presidents of Independent Colleges and Universities); *id.* ("This legislation defines a 'recipient' of federal funds and it does so in such a broad way as to include just about everyone in the United States") (Citizens for Educational Freedom); *id.* (S. 2568 would make "just about everybody and everything a 'recipient' of indirect federal financial assistance") (American Association of Christian Schools); *id.* S27479 (S. 2568 "extends coverage for the first time to State and local entities that actually receive no Federal financial assistance") (Sen. Hatch).

S. Rep. No. 100-64, at 6. Rather than attempt to expand the class of entities covered by Title IX and the other program-specific statutes, it simply added a proviso to each of these statutes defining "program or activity" to make clear that if an entity receives federal financial assistance, coverage applies to that entity's activities "institution-wide." *Id.*; *see id.* at 18 ("The definition of 'program or activity' and 'program' contained in the bill describe the application of the principle of institution-wide coverage to the public and private entities which are recipients of federal financial assistance.").

To trigger institution-wide coverage under the CRRA, an entity—even an "entity which is established by two or more [covered] entities"—must itself be "extended Federal financial assistance." 20 U.S.C. § 1687. But if any part of an entity receives such assistance, then "all of [the entity's] operations" are covered. *Id.* In pertinent part, the CRRA provides:

> For the purpose of this chapter, the term "program or activity" and "program" mean all of the operations of—
>
> * * * *
>
> (2)(A) a college, university, or other post-secondary institution, or a public system of higher education; or
>
> * * * *
>
> (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—
>
> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
>
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
>
> * * * *

> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);
>
> *any part of which is extended Federal financial assistance* * * *. [*Id.* (emphasis added).]

The operations of the NCAA do not constitute a "program or activity" within the meaning of the CRRA because no part of the NCAA—not the NCAA executive committee, not the NCAA rules committee, and not any other part of the NCAA itself—receives federal aid. The Committee Report accompanying the CRRA confirms this reading, and provides still more evidence that Congress did not intend Title IX to cover private organizations on the basis of a related (but distinct) entity's receipt of federal aid. It states: "For example, in a Catholic diocese where 3 parishes receive federal aid, the parishes are geographically separate facilities which receive federal aid, and the diocese is a corporation or private organization of which the parishes are a part. *Only the three parishes which receive federal aid are covered by the antidiscrimination laws.*" S. Rep. No. 100-64, at 21-22 (emphasis added). By analogy, the NCAA is a private organization whose member institutions receive federal aid. Only the institutions that receive federal aid are covered by Title IX; the NCAA—like the diocese—does not itself receive such aid, and so is not covered.

A contrary conclusion would significantly expand the definition of what a covered recipient is in the first place, bringing a broad new class of private entities within the statute's reach. *See infra* at 35-36. Yet in passing the CRRA, Congress took pains to make clear that the Act "addresses only the scope of coverage under [the program-specific statutes] of *recipients of federal financial assistance*," that it does "not change in any way who is a recipient of federal financial assistance," and that it "does not overrule or alter the Supreme Court ruling in [*Paralyzed Veterans*]." S. Rep. No. 100-64, at 30-31 (em-

phasis added); *accord* 134 Cong. Rec. S2735 (Mar. 22, 1988) (Sen. Rudman); *id.* H567, H577, H583 (May 2, 1988) (Reps. Hawkins, Fish, and Edwards). In fact, Congress made express that "[n]othing in the [CRRA] shall be construed to extend [coverage] to ultimate beneficiaries of federal financial assistance excluded from coverage before the [CRRA's] enactment," CRRA, § 7, 102 Stat. 31; thus, as one senator observed during the debate on the Act, "an organization will not be deemed to be receiving Federal financial assistance merely because one of its members, customers or clients receives some Federal benefit." 134 Cong. Rec. S2735 (Mar. 22, 1988) (Sen. Rudman).

E. The Title IX Regulations And Prior Agency Interpretations Make Clear That Title IX Does Not Extend To Private Athletic Associations.

The Title IX regulations also refute Smith's claim. On the particular issue of athletics, the regulations are addressed exclusively to "interscholastic, intercollegiate, club or intramural athletics offered by a *recipient*," which the regulations plainly treat as an educational institution. 34 C.F.R. § 106.41(a) (emphasis added).[17] Moreover, the regulations state that a recipient's duty to comply with Title IX "is not obviated or alleviated by any rule or regulation of any * * * athletic or other league, or association" to which it belongs. *Id.* § 106.6(c). The obvious negative pregnant is that athletic associations—including the NCAA, the Nation's foremost private athletic association—that do not receive federal financial assistance are not covered by Title IX, even if their members are.[18]

[17] The Department of Health, Education, and Welfare ("HEW")—delegated by Congress the responsibility for implementing Title IX, 20 U.S.C. § 1682—issued Title IX regulations in 1975. HEW later issued a "proposed policy interpretation" on Title IX and intercollegiate athletics. *See* 43 Fed. Reg. 58070-75 (Dec. 11, 1978). That policy interpretation also makes clear that the Title IX regulations only apply to "*recipients* who operate or sponsor * * * athletics," and, like the regulations, is clearly addressed to educational institutions. *Id.* at 58070 (emphasis added).

That is the precise position that the agency took in *NCAA* v. *Califano*, 622 F.2d 1382 (10th Cir. 1980). *Califano* involved a facial challenge by the NCAA to the Title IX regulations. The agency moved to dismiss the suit, arguing that the NCAA—not being a federal funding recipient—lacked standing to challenge the Title IX regulations. The district court agreed, explaining that the "administrative provisions in question exert no direct regulatory effect upon the NCAA" because it "receives no federal financial assistance," and the regulations—like the statute itself—"apply only to 'recipients' of federal financial assistance." 444 F. Supp. 425, 430-431 (D. Kan. 1978). While reversing on other grounds, the Tenth Circuit agreed that the NCAA lacked standing to proceed on its own behalf, reiterating that the Title IX "regulations can only be read to apply to the member colleges and *not to the NCAA itself*." 622 F.2d at 1387 (emphasis added).

In its Tenth Circuit brief in the *Califano* case, the agency made its position perfectly clear: "The [Title IX] regulation applies to actions of colleges receiving federal

[18] After the rule in Section 106.6(c) was adopted, "colleges and universities" expressed concern that the rules of intercollegiate athletic associations could "plac[e] the institutions in a posture of noncompliance with Title IX." *See* 44 Fed. Reg. 71413, 71422 (Dec. 11, 1979). Despite acknowledging that "violation of intercollegiate athletic rules can have a severe effect on the athletic opportunities within an affected program," HEW refused to modify the provision. *Id.* As it explained, athletic association "rules do not prohibit choices that would result in compliance with Title IX," and, in any event, "[s]ince all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve collectively any wide-spread Title IX compliance problems resulting from association rules." *Id.* Tellingly absent from the agency's comments is any suggestion that Title IX applies to the athletic associations themselves.

funds, *and in no way applies to private athletic associations.*" Br. for Appellee Sec'y of HEW, 10th Cir. No. 78-1632 ("HEW Br.") at 13-14 (emphasis added). In a footnote to this statement, the agency added: "HEW's regulation states that compliance by colleges is not excused by observing any inconsistent rules of an athletic association, 86.6(c), *but does not require the latter to change their rules.*" *Id.* 14 n.7 (emphasis added). That agency position follows inexorably from the language, purpose, and origin of Title IX, squares with this Court's decisions interpreting Title IX and the other program-specific statutes, and compels the conclusion that the NCAA—the private athletic association to which the agency's statement was directed in *Califano*—is not covered by Title IX.[19]

As a last-ditch effort, Smith claims that unless Title IX is extended to the NCAA, "educational institutions could attempt to do indirectly through the NCAA that which they are prohibited from doing under Title IX directly." Opp. 9.[20] As Smith herself is quick to point out, however,

---

[19] Prior to *Califano*, HEW had apparently taken the view that Title IX could extend to state high school athletic associations. *See* NCAA Reply Br., 10th Cir. No. 78-1632 (appending letters from HEW to the Virginia High School League, the California Department of Education, and the Alabama State Athletic Association). These associations are not "private," but instead appear to be creatures of state law. In that regard, they are analogous to the association in *Horner* v. *Kentucky High School Athletic Ass'n*, 43 F.3d 265, 268-269 (6th Cir. 1994) (quoting statute), which was charged by state law "'to manage interscholastic athletics at the high school level'" on behalf of the state board of education—an entity which operates programs receiving hundreds of millions of dollars in federal funds. *See* Pet. 20-21 (discussing *Horner*).

[20] This argument rests on the suggestion that the NCAA is a "subterfuge" designed to circumvent Title IX. Opp. 9. But the NCAA was founded nearly 70 years *before* Title IX, and assumed its "critical role" in governing intercollegiate athletics long before that statute was passed. *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. at 120.

colleges and universities subject to Title IX are not excused from the statute's mandate on the ground that they are following NCAA rules or decisions. *See* Opp. 10 n.5 (citing 34 C.F.R. § 106.6(c)); note 18, *supra*. In any event, even if this Court believed a different regime were preferable, it would of course not be free to disregard the clear intent of Congress to limit federal coverage to recipients of federal aid.

III. ADOPTING THE INDIRECT BENEFICIARY OR RELATIONSHIP RATIONALE FOR EXTENDING FEDERAL COVERAGE WOULD HAVE BROAD IMPLICATIONS BEYOND THE NCAA AND TITLE IX.

The Court need go no further to decide this case. But it is nevertheless important to recognize that adopting either the relationship or indirect beneficiary rationale to extend Title IX to the NCAA would have broad implications beyond the NCAA and even Title IX. In addition to the NCAA, there are hundreds if not thousands of private organizations and associations that do not themselves receive federal financial assistance, but have members—including colleges and universities, hospitals, and public contractors—that do. *See* Appendix, *infra*. If the NCAA were subject to Title IX by virtue of its relationship with members, then these organizations, too, would be subject to claims that they are vicariously covered based on their relationship with federal funding recipients. Title IX coverage would be limited to "any education program or activity," 20 U.S.C. § 1681(a), but all other activities of such membership organizations would be subject to the other program-specific statutes with the same federal funding trigger—Title VI, Section 504, and the Age Discrimination Act—which are not by their terms limited to education or any particular field. *See* note 1, *supra*.

The potential implications of the Third Circuit indirect beneficiary rationale are even broader. If, as the Third Circuit held, the NCAA's receipt of nominal payments from members is itself sufficient to trigger Title IX, then the program-specific statutes would cover virtually *any* individual or entity that receives payments from—and, thus, under the Third Circuit rationale, "benefits from"—an entity that, in turn, receives federal assistance. In the case of a college or university alone that would exponentially expand the scope of federal coverage from the institution that actually receives federal funds to anyone doing business with it—contractors, businesses, employees, and countless others. In other words, "the statutory 'limitation' on [federal] coverage would virtually disappear, a result Congress surely did not intend." *Paralyzed Veterans*, 477 U.S. at 609.

This has enormous practical consequences for entities such as the NCAA that—because they do not receive federal assistance—have never agreed to be covered by Title IX in exchange for federal funds. As Congress has recognized, "when we expand Federal jurisdiction under [the program-specific statutes], we expand the burdens accompanying them—paperwork, on-site compliance reviews, affirmative action requirements and much more." 134 Cong. Rec. S2396 (Mar. 17, 1988) (Sen. Hatch). *See id.* S2402 (DOJ letter detailing administrative requirements).[21] That does not include the costs of defending against "expensive, vexatious litigation" brought under these laws. *Cannon* v. *University of Chicago*, 441 U.S. at

[21] For example, the Title IX regulations require recipients to designate an employee responsible for ensuring compliance with Title IX, 34 C.F.R. § 106.8; follow extensive recordkeeping and reporting requirements, *id.* § 100.6(b); open their "books, records, accounts, and other sources of information, and [their] facilities" to regulatory officials, *id.* § 100.6(c); and submit to periodic on-site compliance reviews, *id.* § 100.7, as well as full-blown investigations and enforcement actions, *id.* § 100.8. *See id.* § 106.71 (incorporating by reference *id.* §§ 100.6-100.11).

747 (Powell, J., dissenting). One may applaud the ends of the program-specific antidiscrimination laws without coveting the administrative burdens and expenses that accompany federal coverage.

As we have explained, it is clear Congress never intended Title IX to extend this far. Neither the Third Circuit nor Smith has pointed to any concrete evidence to the contrary. Instead, for the purpose of extending Title IX to the NCAA, they rely on the attenuated indirect beneficiary and relationship rationales—proxies that are contradicted by the statute and this Court's decisions, that would sweep within the statute's reach a broad new class of private entities that do not receive federal aid, and that would subject those entities to an extensive regulatory regime intended only for federal funding recipients that have knowingly and voluntarily entered into the Spending Clause contract. The Court should reject those proxies here, and reaffirm that Title IX is limited to entities that in fact "receiv[e] Federal financial assistance," 20 U.S.C. § 1681(a), just like the statute says.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

ELSA KIRCHER COLE
General Counsel
NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION
6201 College Boulevard
Overland Park, KS 66211
(913) 339-1906

MARTIN MICHAELSON
JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

JOHN J. KITCHIN
ROBERT W. MCKINLEY
SWANSON, MIDGLEY, GANGWERE,
KITCHIN & MCLARNEY
922 Walnut Street
Suite 1500
Kansas City, MO 64106
(816) 842-6100

* Counsel of Record

Counsel for Petitioner

APPENDIX

APPENDIX

Illustrative List Of Membership Organizations That Include Higher Education Institutions Among Their Ranks

Academic Resource Network
American Assembly of Collegiate Schools of Business
American Association for Employment in Education
American Association of Christian Schools
American Association of Colleges for Teacher Education
American Association of Colleges of Nursing
American Association of Colleges of Osteopathic Medicine
American Association of Community Colleges
American Association of Dental Schools
American Association of State Colleges and Universities
American Association of Teachers of Turkic Languages
American Council on Schools and Colleges
American Debate Association
American Institute of Indian Studies
American Mathematical Association of Two Year Colleges
Associated Colleges of the Midwest
Association for Continuing Higher Education
Association for Episcopal Colleges
Association for Gerontology of Higher Education
Association for Library and Information Science Education
Association for Media-Based Continuing Education for Engineers
Association for Theatre in Higher Education
Association of American Colleges and Universities
Association of American Law Schools
Association of American Medical Colleges
Association of American Universities
Association of Catholic Colleges and Universities
Association of Christian Schools International
Association of College Unions International
Association of Collegiate Business Schools and Programs

Association of Collegiate Schools of Architecture
Association of Collegiate Schools of Planning
Association of Community College Trustees
Association of Graduate Liberal Studies Programs
Association of Independent Colleges of Art and Design
Association of Jesuit Colleges and Universities
Association of Mercy Colleges
Association of Military Colleges and Schools of the United States
Association of Minority Health Professions Schools
Association of Presbyterian Colleges and Universities
Association of Professional Schools of International Affairs
Association of Schools of Allied Health Professions
Association of Schools of Journalism and Mass Communication
Association of Southern Baptist Colleges and Schools
Association of Theological Schools in the United States and Canada
Association of University Programs in Health Administration
Association of University Summer Sessions
Broadcast Education Association
Career College Association
Christian College Consortium
Christian Schools International
Coalition for Christian Colleges and Universities
Coalition of Higher Education Assistance Organizations
College and University Personnel Association
Colleges of Mid-America
Community Colleges for International Development
Consortium on Financing Higher Education
Council for Advancement and Support of Education
Council for European Studies
Council of Colleges of Arts and Sciences
Council of Graduate Schools
Council of Independent Colleges
Council on Mennonite Colleges
Graduate Management Admission Council
Great Lakes Colleges Association

Higher Education Consortium for Urban Affairs
Independent Schools Association of the Central States
Institute for the International Education of Students
Inter-American College Association
International Association for Continuing Education and Training
International Association for Management Education
International Christian Accrediting Association
International Council on Education for Teaching
International University Consortium
Interuniversity Communications Council
Journalism Association of Community Colleges
Law School Admission Council
League for Innovation in the Community College
Lutheran Educational Conference in North America
Middle States Association of Colleges and Schools
National Association for Business Teacher Education
National Association for Equal Opportunity in Higher Education
National Association for Law Placement
National Association of Colleges and Teachers of Agriculture
National Association of Episcopal Schools
National Association of Federally Impacted Schools
National Association of Health Career Schools
National Association of Independent Colleges and Universities
National Association of Private, Nontraditional Schools and Colleges
National Association of Schools and Colleges of the United Methodist Church
National Association of Schools of Art and Design
National Association of Schools of Dance
National Association of Schools of Music
National Association of Schools of Theatre
National Association of State Approved Colleges and Universities
National Association of State Universities and Land-Grant Colleges

National Association of Substance Abuse Trainers and Educators
National Catholic Educational Association
National Collegiate Honors Council
National Commission for Cooperative Education
National Consortium for Black Professional Development
National Consortium of Arts and Letters for Historically Black Colleges and Universities
National Consortium of Educational Access
National Council of Educational Opportunity Associations
National Council on Religion and Public Education
National Forensic Association
National Guild of Community Schools of the Arts
National Registration Center for Study Abroad
National Student Exchange
New England Association of Schools and Colleges
North Central Association of Colleges and Schools
Northwest Association of Schools and Colleges
Northwest Association of Schools and Colleges Commission on Schools
Pennsylvania Association of Colleges and Universities
Public Leadership Education Network
Southern Association of Colleges and Schools
The College Board
Transnational Association of Christian Colleges and Schools
University and College Designers Association
University Continuing Education Association
University Risk Management and Insurance Association
University/Resident Theatre Association
Western Association of Schools and Colleges
Women's College Coalition
World Congress of Teachers of Dancing
World University Colleges Consortium

Sources: 1 *Encyclopedia of Associations* (Christian Maurer & Tara E. Sheets, eds. 34th ed. 1998); Higher Education Publications, Inc., *1998 Higher Education Directory* (1997).

STATUTORY AND REGULATORY ADDENDUM

20 U.S.C. § 1681 provides:

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for

such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association,

Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or

secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

20 U.S.C. § 1682 provides:

§ 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by using rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be

taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

20 U.S.C. § 1687 provides:

§ 1687. Interpretation of "program or activity"

For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other post-secondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of this title), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.

34 C.F.R. § 106.2(h) provides:

§ 106.2 Definitions.

(h) *Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from

such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.6 provides:

§ 106.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

34 C.F.R. § 106.41 provides:

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

No. 98-84

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R.M. SMITH,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENT

Carter G. Phillips*
Virginia A. Seitz
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8015

Counsel for Petitioner
*Counsel of Record

December 8, 1998

QUESTION PRESENTED

Whether the court of appeals properly held that respondent -- a student-athlete arbitrarily denied eligibility to participate in intercollegiate athletics because of her gender -- can state a claim against the National Collegiate Athletic Association arising under Title IX of the Education Amendments of 1972, as amended by the Civil Rights Restoration Act of 1987, and therefore that respondent should be permitted to amend her complaint.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS AND RULES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

* Denotes documents lodged for this Court's convenience.

INTRODUCTION

The issue in this case is whether Renee Smith will have the opportunity to show that the National Collegiate Athletic Association ("NCAA") engaged in discrimination in violation of section 901(a) of Title IX of the Education Amendments of 1972 ("Title IX"), when it arbitrarily denied her the opportunity to play intercollegiate volleyball at Hofstra and at the University of Pittsburgh because of her gender. Title IX was enacted to eliminate sex-based discrimination in the many federally-assisted education programs in this nation, including the pervasive discrimination and inequality that infected intercollegiate athletics. The NCAA governs virtually all significant aspects of intercollegiate athletics in the United States. As a practical matter, a statutory scheme intended to end sex-based discrimination in intercollegiate athletics must cover the NCAA, as well as its member institutions, or it cannot conceivably achieve its goal.

Congress did not overlook this fundamental reality. Title IX, as amended by the Civil Rights Restoration Act of 1987, defines intercollegiate athletics at federally-assisted colleges and universities as covered education programs. Section 901(a) of Title IX broadly prohibits sex-based discrimination "*under* any education program or activity receiving Federal financial assistance." (emphasis supplied.) Section 901(a) does not limit Title IX coverage to recipients of Federal financial assistance; instead, it forbids any entity with authority over a covered education program, including intercollegiate athletics, to engage in sex-based discrimination. The NCAA plainly has such authority and it is subject to Title IX whether or not it receives Federal assistance. On this basis alone, Smith alleged a violation of Title IX when she alleged that the NCAA discriminated against her on the basis of her sex by denying her eligibility to play intercollegiate volleyball at two

federally-assisted institutions, Hofstra and University of Pittsburgh.

In any event, the NCAA receives Federal assistance. Accordingly, in the alternative, as the court of appeals correctly held, Smith was entitled to amend her complaint to allege that the NCAA is subject to Title IX because it directly and indirectly receives Federal financial assistance. Such an amendment would cure any arguable deficiencies in Smith's Title IX claim. Under the generous standard applied to requests to amend pleadings to cure deficiencies, Smith, a pro se plaintiff, was plainly entitled to amend her complaint.

Smith had a good faith basis for her proposed amendment: She learned during the pendency of her case that the NCAA administers the National Youth Sports Program ("NYSP") and controls the NYSP Fund, which receives Federal financial assistance, and Smith sought to allege that the NCAA receives the assistance provided to the Fund, either directly or indirectly. In addition, Smith sought leave to allege that the NCAA indirectly receives Federal assistance from Hofstra and University of Pittsburgh, because those federally-assisted institutions assign the operation of numerous aspects of their intercollegiate athletic programs to the NCAA and provide the NCAA with funds and other consideration to carry out that assignment. These allegations of direct and indirect receipt of Federal financial assistance suffice to subject the NCAA to Title IX.

For these reasons, the court of appeals properly remanded this case to the district court to allow the complaint to be amended and to permit this case to proceed with discovery and an ultimate determination of its merits.

STATEMENT OF THE CASE

1. Renee M. Smith graduated from high school in the spring of 1991, and enrolled in St. Bonaventure University that autumn. There she played intercollegiate volleyball during the 1991-92 and 1992-93 seasons. She elected not to participate in intercollegiate volleyball during the 1993-94 season so that she could graduate in a remarkably short two and a half years. In 1994, Smith enrolled in a postbaccalaureate program at Hofstra; and in 1995, she enrolled in a postbaccalaureate program at the University of Pittsburgh.[1] Smith had used only two years of her collegiate eligibility playing intercollegiate volleyball at St. Bonaventure, and she wanted to play at Hofstra during the 1994-95 season and at University of Pittsburgh during the 1995-96 season. Pet. App. 3a-4a.

Hofstra and University of Pittsburgh are members of the NCAA. The NCAA is an unincorporated association comprised of 1,200 public and private colleges and universities. It promulgates rules governing all aspects of intercollegiate athletics, including recruiting, academic standards for student-athletes and, pertinent here, eligibility for participation in intercollegiate athletics. See *NCAA* v. *Tarkanian*, 488 U.S. 179, 183 (1988) (the NCAA has "adopted rules, which it calls 'legislation,' governing the conduct of the intercollegiate athletic programs of its members") (citation omitted). "By joining the NCAA, each member agrees to abide by and enforce such rules." *Id.* As the NCAA describes, it and its member institutions profit greatly from their joint enterprise, earning annual revenues of $200 million. See Pet. Brief ("Br.") at 4.

---

[1] St. Bonaventure offered neither of the postbaccalaureate programs that Smith decided to pursue.

Members which decide not to accede to NCAA authority stand to lose their right to participate in this lucrative enterprise.

The NCAA has enacted and enforces a Bylaw that governs the participation of postbaccalaureate students, such as Smith, in intercollegiate athletics. Specifically, Bylaw 14.1.8.2. ("Postbaccalaureate Bylaw") inferentially provides that a student-athlete may not participate in intercollegiate athletics at a postgraduate institution other than the institution from which the student earned her undergraduate degree:

> A student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree of its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period . . . .

Smith was in good academic standing and in compliance with all NCAA eligibility requirements other than the Postbaccalaureate Bylaw for the 1994-95 and 1995-96 athletic seasons. At Smith's behest and on her behalf, Hofstra and University of Pittsburgh applied for waivers of the Postbaccalaureate Bylaw

so that Smith could continue to play intercollegiate volleyball. The NCAA waiver committee without explanation denied both requests and Smith was not permitted to participate. Pet. App. 4a-5a. Remarkably, the NCAA in its brief to this Court made absolutely no attempt to explain what rational basis exists for refusing to allow a student in Smith's situation to play intercollegiate athletics or, more generally, to explain its process for making waiver determinations.

Many of the NCAA's member institutions receive Federal financial assistance. Pet. Br. at 3. In addition, the NCAA itself administers the NYSP and controls the NYSP Fund which, for purposes of any motion to dismiss, receives Federal financial assistance. See *Bowers* v. *NCAA*, 9 F. Supp. 2d 460, 493-94 (D.N.J. 1998); *Cureton* v. *NCAA*, Civ. No. 97-131, 1997 WL 634376, at *2 (E.D. Pa., Oct. 9, 1997); Letters from the Office for Civil Rights, Department of Health and Human Services to Title IX complainant, dated Nov. 8, 1994, and March 10, 1998 (finding that "[t]he NCAA . . . is a recipient of Federal financial assistance through a Community Services Block Grant from this Department").[2] As described *infra* at 35-36, through the NYSP and the NYSP Fund, the NCAA is in "partnership with the Federal government" and is subject to Title IX.

2. In August 1996, Smith, proceeding pro se, instituted this action against the NCAA. In her complaint, she alleged that the NCAA's discriminatory treatment of requests for waivers of NCAA Bylaws violates Title IX of the

---

[2] As explained *infra* at 34-35, the cases and letters cited in text constitute part of Smith's good faith basis to amend her complaint to allege that the NCAA directly and indirectly receives Federal financial assistance. The letters from the Office of Civil Rights, Department of Health and Human Services, have been lodged with the Court.

Education Amendments of 1972.[3] Specifically, Smith alleged that the NCAA discriminatorily grants waivers of its Bylaws to male student-athletes, and thus, that if she were a male, she would have been permitted to use the final two years of eligibility. The NCAA filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Smith had not alleged and could not allege that the NCAA receives Federal financial assistance and that she was required to do so to avoid dismissal of her claim under Title IX.[4]

In response, Smith argued that the NCAA "is a recipient of federal funds and benefits greatly from the aid." Plaintiff's Br. in Opposition to Motion to Dismiss at 5 (Docket No. 9, dated Nov. 19, 1996). She also asserted that the NCAA should be covered by Title IX because "'it enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity'" so that "'[a]s a matter of public policy, this Court should subject NCAA actions regarding the operation of education institutions to Title IX scrutiny.'" *Id.* at 6 (quoted in Pet. App. 30a). Finally, she pointed out that "although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees." *Id.*

---

[3] Smith also alleged that the NCAA's promulgation and enforcement of the Postbaccalaureate Bylaw violates section 1 of the Sherman Act, 15 U.S.C. §1, and constitutes a breach of contract under state law.

[4] In support of its motion to dismiss, the NCAA submitted the Affidavit of Frank E. Marshall which asserts that "[t]he NCAA receives no federal financial assistance of any kind." Docket No. 5, filed Oct. 28, 1996. A pro se plaintiff confronted with such an assertion likely would view it as a statement of fact; it is, in the circumstances presented here, a legal conclusion. The Affidavit goes on, at least incompletely, to describe the NYSP Fund. Compare with *Bowers*, 9 F. Supp. 2d at 493-94.

On May 21, 1997, the district court dismissed Smith's complaint for failure to state a claim. The district court refused to construe Smith's complaint to allege that the NCAA received Federal financial assistance either directly or indirectly. In addition, the court held that the alleged connections between the NCAA and Federal financial assistance to member institutions were "too far attenuated" to make the NCAA a recipient of Federal funds. Pet. App. 32a.[5]

Smith then filed a motion for leave to amend her complaint. She sought to amend the complaint to add Hofstra and University of Pittsburgh as defendants, and to add an allegation that the NCAA receives Federal financial assistance within the meaning of Title IX. She explained in her motion that she intended the amended complaint to cure any defects in alleging jurisdiction over the NCAA. Pet. App. 18a. And, in her proposed amended complaint, she alleged that "'[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance.'" *Id.* (quoting Appellate Appendix at 98).

On June 5, 1997, the district court denied Smith's motion for leave to amend her complaint against the NCAA "as moot, the court having granted defendant's motion to dismiss on May 20, 1997." Pet. App. 36a. Smith filed an appeal in the

---

[5] With respect to the Sherman Act claim, the court held that the NCAA's implementation of the Postbaccalaureate Bylaw was not related to its commercial or business activities and did not provide the NCAA or its member institutions with any commercial advantage and thus "is not the type of action to which the Sherman Act was meant to be applied." Pet. App. 28a. The state law contract claim was dismissed as a result of dismissal of the two Federal claims.

Third Circuit. She argued that the district court's decisions dismissing her complaint and denying her motion to amend should be reversed. Smith specifically contended that "the NCAA directly and indirectly receives federal funding, which makes the [NCAA] a 'recipient' of federal aid and subject to Title IX scrutiny." Smith Br. at 9. See *id.* at 21 ("the NCAA directly and indirectly receives federal funding"); *id.* at 22 ("[t]he NCAA's National Youth Sports Program receives direct federal funding").[6]

The court of appeals reversed the district court's order denying Smith leave to amend her Title IX claim against the NCAA. The court noted that "it is unclear whether the district court was unaware of its discretion to allow the proposed amended complaint despite the dismissal or whether the court believed that the amendment would be futile even if pleaded." Pet. App. 17a. Either way, the court held that denial of Smith's motion to amend was an abuse of discretion, because Smith could amend her complaint to allege that the NCAA is subject to Title IX.

The court stated that "the NCAA is subject to Title IX provided that it receives federal financial assistance within the meaning of section 1681(a)," *i.e.*, that an allegation that the NCAA receives Federal financial assistance would suffice to withstand a motion to dismiss. The court explained that Hofstra and University of Pittsburgh (and other NCAA member institutions) are education programs and activities which receive Federal financial assistance, and that the NCAA acts as its member institutions' "surrogate" with respect to intercollegiate athletics. If the NCAA receives funds from member institutions

---

[6] The NCAA is thus simply wrong when it asserts in its brief to this Court that Smith failed to raise in the lower courts the question whether the NCAA directly receives Federal financial assistance. *See* Pet. Br. at 13 n.7.

to be used in the governance of a joint enterprise of those member institutions, it may be treated as the indirect recipient of Federal funds received by those member institutions. Thus, the court reasoned, Smith's complaint would withstand a motion to dismiss if she alleged that the NCAA indirectly receives Federal financial assistance. See Pet. App. 13a-16a.

The court affirmed the district court's dismissal of Smith's original complaint because it contained no allegation that the NCAA received Federal financial assistance either directly or indirectly.[7] But because Smith had a basis to amend her complaint to cure this defect, the court of appeals held that the district court abused its discretion when it refused to grant Smith leave to amend her complaint. The court thus "vacated [the district court's order] insofar as the dismissal of the Title IX claim, [and] reversed insofar as the denial of the motion for leave to amend the complaint with respect to the Title IX claim." See Pet. App. 37a-38a. It remanded the case to the district court "for further proceedings in accordance with the opinion of this Court" -- *i.e.*, to allow Smith to amend her complaint. See *id.* at 37a-38a (Judgment, dated March 16, 1998).[8]

---

[7] Judge McKee did not concur in this holding of the other panel members. He would have held that "Smith's original complaint sufficiently states that the NCAA receives federal financial assistance under the pleading requirements that we apply to pro se complaints." Pet. App. 16a (citing *Zilch* v. *Lucht*, 981 F.2d 694 (3d Cir. 1992) ("When, as in this case, plaintiff is a pro se litigant, we have a special obligation to construe [her] complaint liberally.") (alteration in original)). The other two panel members concluded, however, that Smith's pro se status simply underscored her right to amend her complaint to allege that the NCAA receives Federal financial assistance.

[8] On May 27, 1998, the district court filed Smith's proposed amended complaint as her first amended complaint.

Both parties filed timely petitions for rehearing *en banc* which were denied on April 20, 1998. Pet. App. 39a. This Court granted the NCAA's petition for *certiorari*.

SUMMARY OF ARGUMENT

I. Title IX contains two distinct causes of action: (a) a private cause of action for all appropriate relief, including money damages, see section 901(a) of Title IX, 20 U.S.C. §1681(a); *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); (b) a Federal administrative enforcement scheme which authorizes Federal departments and agencies to regulate federally-assisted programs and activities and, after a finding of non-compliance, to terminate Federal financial assistance. Renee Smith filed a private cause of action alleging that the NCAA violated section 901(a) of Title IX when it denied her the opportunity to play intercollegiate volleyball at two federally-assisted institutions, Hofstra and University of Pittsburgh, because of her gender. These allegations state a claim against the NCAA.

Section 901(a)'s plain language makes clear that it was "enacted for the benefit of a special class of which the plaintiff is a member." *Cannon*, 441 U.S. at 689. It does not define a class of defendants and, *a fortiori*, does not limit liability solely to recipients of Federal financial assistance. *Id.* at 692-93. Instead, section 901(a) prohibits discrimination "*under* any education program or activity receiving Federal financial assistance." (emphasis supplied.) The natural meaning of section 901(a) therefore is that any entity with authority over a federally-assisted education program that discriminates on the basis of gender may be held accountable for its actions under Title IX.

The CRRA, which defines "program or activity" under section 901(a) broadly as "all of the operations of" a federally-assisted education entity, supports this reading. While an education entity generally retains authority over its "operations," it may assign that authority to a third party, as occurred here. The NCAA was assigned authority over the operation of federally-assisted intercollegiate athletic programs and is thus liable for its discrimination.

It is also instructive to contrast the language of section 901(a) with that of section 902(1). The latter authorizes Federal fund termination with respect to "recipients," a word that does not appear in section 901(a). By contrast, the Federal courts may not order the termination of Federal funding, but are not limited to administrative remedies. See, *e.g.*, *Gwinnett*, 503 U.S. at 76. Federal courts have the power to award "all appropriate relief," *id.* at 68, against such an institution. Relief is plainly most appropriate when awarded against the party which is responsible for, and carries out, the discrimination. That conclusion is particularly apt here: The NCAA alone can provide female student-athletes with a nondiscriminatory opportunity to participate in intercollegiate athletics.

Relevant legislative history, too, supports the plain meaning of section 901(a). Congress intended its action to end sex discrimination in intercollegiate athletics. To be sure, there is no legislative history addressing the parameters of the private cause of action in 1972, see *Gwinnett*, 503 U.S. at 71. But the history of the CRRA, which amended Title IX, reflects Congress' concern with those "who operate programs or conduct activities providing services to others and who are in a position to injure ultimate beneficiaries through discrimination." S. Rep. No. 100-64, at 25 (1987) (quotation omitted). Even the NCAA testified that the CRRA's definition of "program or

activity" would cover non-recipients with authority over a federally-assisted program.

In the unusual circumstance where an entity with authority over a federally-assisted program is not the entity that receives Federal assistance, holding the former liable serves Title IX's dual purposes. *First*, it protects the benefited class by providing entities with authority over a federally-assisted program with clear notice that sex-based discrimination is forbidden. Such entities may then, at their option, decline such authority, but, if they accept it, they do so with full knowledge that they may not discriminate. *Second*, it most effectively deters use of federal resources to support discrimination, because the entity which is responsible for, and carries out, discrimination has the best notice and, as here, the best opportunity to take corrective action.

The NCAA's counter argument - that Title IX is Spending Clause legislation and that, absent a contract with the Government, the NCAA lacked constitutionally adequate notice that it was covered - is contrary to established law. Title IX is based not only on the Spending Clause, but also on Congress' authority under section 5 of the Fourteenth Amendment. And, as *Grove City College* v. *Bell*, 465 U.S. 555 (1984) holds, Title IX covers indirect recipients of Federal aid -- entities which plainly are not in privity with the Government. The actual scope of Spending Clause legislation, including Title IX, turns on the policies and purposes of the legislation. Entities with authority over federally-assisted programs have clear notice that they are subject to Title IX, and the purposes of Title IX are best served by their coverage.

For all of these reasons, Smith's allegation that the NCAA arbitrarily denied her eligibility at Hofstra and University of Pittsburgh based on her gender states a claim under Title IX

whether or not the NCAA receives Federal financial assistance, and her case should proceed on its merits.

II. The judgment of the court of appeals reversed the district court's denial of Smith's motion for leave to amend and remanded the case so that Smith could file an amended complaint alleging that the NCAA directly and indirectly receives Federal assistance. This judgment was plainly correct. Smith's amended allegations address the NCAA's receipt of assistance through the NYSP Fund and through member institutions and cure any arguable deficiencies in Smith's Title IX claim. There was no other basis to deny Smith's motion to amend under the generous standard embodied in Fed. R. Civ. P. 15(a), particularly in light of Smith's pro se status.

Smith had a good faith basis for her proposed amendment, because she learned during the pendency of this case that the NCAA administers the NYSP and operates the NYSP Fund, and thus clearly should be considered a recipient of Federal assistance for purposes of a motion to dismiss. *E.g.*, *Bowers*, 9 F. Supp. 2d at 493-94. On this basis alone, the judgment of the court of appeals should be affirmed.

III. Indirect recipients of Federal financial assistance are subject to Title IX. *Grove City*, 465 U.S. at 564. The NCAA indirectly receives such assistance through the NYSP Fund. The evidence described in *Bowers* supports a claim that the NYSP Fund serves only as a conduit for conveyance of Federal aid to the NCAA. In addition, the CRRA effectively defines the NCAA as an indirect recipient of Federal assistance from the NYSP Fund. More specifically, the NCAA is a "program or activity" within the meaning of the CRRA, because it is a covered education institution under sections 1687(3)(ii) and (4) of that Act, and has a federally-assisted "operation" or "part" -- the NYSP Fund.

In addition, the NCAA indirectly receives Federal assistance through assignment by member institutions of authority over intercollegiate athletic programs, accompanied by dues and other consideration to carry out that assignment. The NCAA is not a routine downstream payee of a federally-assisted education institution, like a utility or a goods supplier. Those are mere beneficiaries and are plainly not subject to Title IX. Cf. *United States Dep't of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 607 (1986). By contrast, the NCAA has accepted assignment of authority over a federally-assisted program and of funds from a federally-assisted education entity. Accordingly, the NCAA has accepted the legal obligations that run with that authority, including the obligation not to discriminate on the basis of sex. That conclusion is supported by decisions of this Court, by the substantial weight of lower court authority, and by the unique nature of the NCAA and intercollegiate athletics. The NCAA also is a Federal assistance recipient under the CRRA. It is an "operation" of federally-assisted colleges and universities and is therefore a "program or activity" for purposes of Title IX.

ARGUMENT

THE COURT OF APPEALS' JUDGMENT GRANTING SMITH'S MOTION TO AMEND HER COMPLAINT AND ALLOWING SMITH'S TITLE IX CLAIM AGAINST THE NCAA TO PROCEED ON ITS MERITS SHOULD BE AFFIRMED.

I. *Smith's Allegations That The NCAA Discriminated Against Her Under A Federally-Assisted Education Program Or Activity State A Claim For Violation Of Title IX.*

Introduction

Section 901(a) of Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §1681(a), provides, in part, that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[9]

Title IX is enforced through two different causes of action: First, the statute may be enforced through a private cause of action for all appropriate relief, including money damages, see

---

[9] Section 901(a) is modeled on the prohibition of race and national origin discrimination in Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. §2000d, as were section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and section 303 of the Age Discrimination Act of 1975, 42 U.S.C. § 6102, prohibiting discrimination on the basis of disability and age, respectively.

Franklin v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). Second, the statute provides for Federal administrative enforcement and specifically authorizes Federal departments and agencies empowered to extend Federal financial assistance to education programs and activities to issue regulations and to "terminat[e] or refus[e] to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record . . . of a failure to comply . . ." Section 902(1) of Title IX, 20 U.S.C. §1682(1). See also section 902(2), 20 U.S.C. §1682(2) (enforcing compliance "by any other means authorized by law").

This case involves a private cause of action. Renee Smith alleged that, on the basis of sex, she was denied participation in, the benefits of, and subjected to discrimination under education programs and activities receiving Federal financial assistance -- to wit, intercollegiate athletics sponsored by Hofstra and University of Pittsburgh.[10] She further alleged that the NCAA carried out, and was responsible for, that discrimination. As we now show, Smith's allegations plainly state a claim for relief against the NCAA that may be enforced through a private cause of action arising under section 901(a).[11]

---

[10] The NCAA acknowledges that intercollegiate athletics is an education program or activity within the meaning of Title IX. *See* 34 C.F.R. § 106.31 (so providing). *See also* NCAA Constitution, art. II ("[t]he competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body").

[11] Smith, proceeding pro se, made the essence of this argument to the district court when she asserted that the NCAA "'enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity'"

A. *The Plain Language Of Section 901(a) Of Title IX Clearly Extends To The NCAA's Alleged Conduct.*

Section 901(a)'s plain language makes clear that it was "enacted for the benefit of a special class of which the plaintiff is a member." *Cannon*, 441 U.S. at 689. Phrased as it is in the passive voice, it "expressly identifies the class Congress intended to benefit" and makes that protection its primary focus. *Id.* at 690.

Section 901(a) does not expressly define a class of defendants. Significantly, it does not limit liability for discrimination to recipients of Federal financial assistance, and is not written "simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to education institutions engaged in discriminatory practices." *Cannon*, 441 U.S. at 691-93. It does not say, as the NCAA would have it, that there may be no sex-based discrimination "*by* any education program or activity receiving Federal financial assistance," but rather that there shall be no such discrimination "*under* any education program or activity receiving Federal financial assistance." (emphasis supplied.) The natural meaning of the latter phrase is that, while the education program or activity must receive Federal financial assistance, *any* entity with authority over such a program or activity which discriminates on the basis of sex may also be held

---

so that "'[a]s a matter of public policy, this Court should subject NCAA actions regarding the operation of education institutions to Title IX scrutiny.'" *See* Pet. App. 29a-30a (citation omitted). On this theory, this Court need affirm only the portion of the court of appeals' judgment remanding the case to the district court for further proceedings (though the court of appeals' instruction that Smith is entitled to amend her complaint would also be correct, *see infra* Part II).

accountable for that discrimination whether or not it receives Federal assistance. The NCAA, which has authority over intercollegiate athletics at its federally-assisted member institutions, including Hofstra and University of Pittsburgh, is such an entity.

The definition of "program or activity" added to Title IX by the CRRA in 1987 hammers this point home. The CRRA defines "program or activity" expansively to include "*all of the operations of*" an education entity "any part of which is extended Federal financial assistance." 20 U.S.C. § 1687 (emphasis supplied). An "operation" of an education entity may be conducted by the entity itself, but it may also be assigned in whole or in part to a third party (*e.g.*, the operation of intercollegiate athletics is assigned in large part to the NCAA). Section 901(a) is best read to extend coverage to all entities with authority over the operation of federally-assisted programs or activities.

In the usual Title IX case brought by a private plaintiff for sex discrimination in an education program or activity, the defendant will be the entity that receives Federal financial assistance. But there will be cases where a third party has authority over an education program or activity and is, in fact, the party alleged to be engaged in discrimination. With respect to cases that fall into this category, the language and structure of section 901(a) follow the traditional rule that "'[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages *from the party in default* is implied.'" *Gwinnett*, 503 U.S. at 67 (quoting

Texas & Pacific Ry. Co. v. *Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied)).[12]

B. *The Contrast Between Section 901(a) And Section 902 Supports A Clear Inference That Section 901(a) Extends To Cover The NCAA's Alleged Conduct.*

1. The language of section 901(a), creating the private cause of action for enforcing Title IX, may be contrasted with the language of section 902, which creates the Federal administrative enforcement scheme for Title IX. Section 902(1) contains language strongly suggesting that Federal fund termination is limited to "recipients" of Federal financial assistance:

> Each Federal department and agency which is empowered to extend Federal financial

---

[12] In arguing that only recipients of Federal financial assistance are subject to Title IX, the NCAA relies on lower court decisions holding that Title IX does not give rise to a private right of action against individuals, Pet. Br. at 28, but that reliance is misplaced. First, this Court has never decided whether individuals can be liable under Title IX. In any event, section 901(a) may easily be read not to create individual liability without artificially limiting coverage solely to Federal assistance recipients. Section 901(a) prohibits discrimination "*under* education programs and activities" which are defined as "all of the *operations* of" education entities. (emphasis supplied.) The underlined words suggest that only entities with authority over the operation of education programs and activities are liable for Title IX violations, and that individual agents of such entities, not acting pursuant to official policy or practice, are not liable. Thus, holding the NCAA subject to Title IX in a situation where it is alleged to have excluded a student, solely on the basis of gender, from participating in a Federal program that it controls does not require a significant expansion of the number of Title IX defendants. This case, however, presents no occasion for the Court to determine whether an individual may be liable for violating section 901(a) of Title IX.

> assistance to any education program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the *termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement* . . . .(emphasis supplied.)

Section 901(a), the source of the private cause of action, however, does not use the word "recipient" and does not suggest enforcement is limited to "recipients." To the contrary, its only requirement is that the discrimination occur "under an education program or activity receiving Federal financial assistance." As described above, there must *be* an education program or activity receiving Federal financial assistance, and discrimination based on sex *under* that program or activity must be alleged; but once those conditions are satisfied, any entity with authority over the operation of such a program or activity (including, and almost always, a recipient) is liable to members of the protected class.[13]

---

[13] Finding that the NCAA is the responsible party for causing a flagrant violation of section 901(a) and is subject to whatever remedies are appropriate for that violation thus does not subject its member institutions to fund

This natural reading of section 901(a) is supported by this Court's holding that, in a private action to enforce Title IX, Federal courts have the power to "award any appropriate relief" necessary to remedy a violation, see *Gwinnett*, 503 U.S. at 71. In such a private action, Federal courts have remedial authority that is different from administrative remedial authority. So, for example, Federal courts may not terminate Federal funding, but money damages are available in a private right of action, although they have not been provided through the Federal administrative enforcement scheme. See *Gwinnett*, 503 U.S. at 76.[14] Indeed, damages are available in a private action in part because some victims (*i.e.*, those for whom an injunction or a change in policy would be too late) would otherwise be without appropriate relief, "remediless." *Id.* Cf. *Cannon*, 441 U.S. at 711 ("The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section").

Similarly here, the Court's power to "award any appropriate relief" allows it to reach the entity with authority over the operation of a federally-assisted education program or activity. Relief is most "appropriate" when it is awarded against the party which is responsible for, and carries out, discrimination under a federally-assisted education program.

---

termination. (By contrast, the funds received by the NYSP Fund would expose the NCAA to the full panoply of administrative responsibilities because its status would be that of a recipient covered by section 902(1)).

[14] *See also Gebser* v. *Lago Vista Indep. School District*, 118 S. Ct. 1989, 1998-99 (1998) ("there is no indication that payment of damages has been demanded as a condition of finding a recipient to be in compliance with [Title IX]," and thus the private cause of action potentially allows "imposition of greater liability" than the public enforcement scheme).

Moreover, the NCAA alone can provide Smith and other female student-athletes with a nondiscriminatory opportunity to participate in intercollegiate athletics. The NCAA dominates intercollegiate athletics. If member institutions like Hofstra and University of Pittsburgh simply withdraw from the NCAA in response to alleged discrimination, their female student-athletes will lose *any* opportunity to play intercollegiate athletics. That is not an appropriate remedy for a violation of section 901(a) of Title IX: It leaves victims of discrimination under federally-assisted education programs and activities unprotected (and possibly worse off than if they had tolerated discrimination), and it allows intercollegiate athletics to continue operating under discriminatory rules and practices. Cf. *Gebser*, 118 S.Ct. at 1999 (recognizing that damages for violations under Title IX "in a particular case might well exceed a recipient's level of federal funding").

2. *United States Dep't. of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 607 (1986), is not to the contrary. There, while interpreting the scope of its rulemaking authority under section 504 of the Rehabilitation Act of 1973, the Department of Transportation ("DOT") concluded that it did not have jurisdiction to regulate commercial airlines that did not receive Federal financial assistance. The court of appeals vacated DOT's regulations and ordered DOT to apply its regulations to all carriers. This Court, however, held that mere beneficiaries of Federal assistance given to airport operators were not subject to DOT's jurisdiction, and that extending the reach of section 504 to beneficiaries of Federal aid would give it "almost limitless coverage." *Id.* at 608.

There are three reasons *Paralyzed Veterans* should not be read to provide that a private cause of action enforcing Title IX will lie only against recipients of Federal financial assistance.

First, as *Cannon* and *Gwinnett* make plain, the scope of the private right of action to enforce Title IX and Federal administrative authority are not perfectly congruent; the remedies for the private right of action are different, embracing appropriate relief for violations. *Second*, the only issue in *Paralyzed Veterans* was whether DOT had jurisdiction over mere beneficiaries of Federal assistance. No party ever suggested that commercial airlines participated in any way in (let alone governed or controlled) the specific "program or activity receiving Federal financial assistance" at issue. The Court thus had no occasion to determine whether an entity with authority over the operations of a federally-assisted program or activity is liable for discrimination thereunder in a private cause of action. *Finally*, holding entities which operate federally-assisted programs or activities liable for their own discrimination *thereunder* will not result in "limitless coverage," as would occur if coverage traveled with the economic ripple effect of Federal aid.

* * * *

A plaintiff in a private right of action enforcing Title IX is entitled to "any appropriate relief." *Gwinnett*, 503 U.S. at 71. Here that appropriate relief necessarily includes a right to seek relief for sex-based discrimination from the NCAA, the entity alleged to have discriminated in its operation of federally-assisted education programs.

C. *Legislative History Supports The Plain Meaning And Structure Of Title IX.*

An implied limitation on the class of defendants subject to Title IX liability is especially unwarranted in the context of intercollegiate athletics. The history of Title IX and the CRRA, which amended Title IX, manifest Congress' intent that Title

IX's prohibitions end sex discrimination in intercollegiate athletics.[15] The NCAA was the singular, powerful sovereign of intercollegiate athletics in 1972, when Title IX was enacted, and in 1987, when the CRRA was enacted, and remains so today. The broad language of Title IX ensures that entities such as the NCAA -- that is, entities with the power and opportunity to discriminate -- are subject to suit under section 901(a).

There was no legislative history specifically addressing the parameters of the private right of action enforcing section 901(a) in 1972, because that cause of action was implied. See *Gwinnett*, 503 U.S. at 71. But in 1987, well after this Court found Title IX enforceable through a private cause of action in *Cannon*, Congress passed the CRRA which substantially expanded Title IX's coverage by defining "program or activity" broadly to include "all of the operations of" an education entity

---

[15] Shortly after Title IX's enactment, Senator Tower sought first an amendment exempting intercollegiate athletics from coverage and then an amendment exempting revenue-producing intercollegiate sports from coverage. The Tower Amendments failed, and were replaced by the Javits Amendment instructing the Department of Health, Education, and Welfare to draft regulations that "with respect to intercollegiate athletics [,include] reasonable provisions considering the nature of particular sports." *See* Gender and Athletics Act, P.L. 93-380, section 844, 88 Stat. 484, 612 (1974). This amendment, and the regulations implementing it, demonstrate Congress' special concern with discrimination in intercollegiate athletics.

Thereafter, the debates on the CRRA reveal Congress' strong and uniform concern with ending discrimination in intercollegiate athletics. *See, e.g.*, S. Rep. No. 100-64, at 2 ("Title IX has broken down a variety of sex barriers in education, including participation in athletics"); 134 Cong. Rec. S248 (1998) (without the CRRA, women may be denied the right "to participate fully in every aspect of the curriculum or interscholastic sports may be denied") (Statement of Sen. Simon); 134 Cong. Rec. H566 (1988) (without the bill, institutions will be "denying equal opportunity to young women in athletics") (Statement of Rep. Hawkins). *See also Cohen* v. *Brown University*, 991 F.2d 888, 894 (1st Cir. 1993) (describing legislative history).

"any part of which is extended Federal financial assistance." 20 U.S.C. § 1687. In so doing, Congress explained that it wanted to ensure that Title IX reached those in a position to injure others with their discrimination:

> Congress was not concerned with regulating the activities of the tens of millions of Americans who are the ultimate beneficiaries of the federal financial assistance, but who in no sense operate a federally financed program or activity. Rather, *Congress was concerned with the state agencies, the educational institutions and others who operate programs or conduct activities providing services to others and who are in a position to injure ultimate beneficiaries through discrimination.* [S. Rep. No. 100-64, at 25 (quotation omitted; emphasis supplied.)]

Indeed, in its testimony related to the CRRA and its predecessors, the NCAA stated its view that the CRRA's amendment would extend Title IX to cover athletic conferences with authority to operate education programs, but which do not themselves receive Federal assistance:

> the legislation -- as I understand it -- will bring under Federal rule making and enforcement authority aspects that, in fact, do not receive Federal aid. The bill provides, I believe, that if one BEOG-aided nursing student attends Kansas State University, the K-State crew -- a club sport only -- would be under Title IX, the Big Eight Athletic Conference would be under Federal inspection and enforcement. . . . [*Hearings Before the House Education and Labor Committee and the Subcommittee on*

Civil and Constitutional Rights of the House Judiciary Committee, 98th Cong., 225 (1984)(statement of Ruth M. Berkey, NCAA Assistant Executive Dir.). See also *id.* at 141.][16]

This history, though scanty, fully supports a broad reading of section 901(a) to prohibit discrimination by all entities with authority over the operations of federally-assisted education programs and activities.

D. *The Purposes Of Title IX Can Only Be Adequately Served By Holding The NCAA Potentially Liable For The Conduct Alleged.*

1. In the unusual circumstance where the entity with authority over a federally-assisted education program or activity is not the entity which receives the Federal assistance, holding the former liable for its own discrimination serves both of Title IX's purposes.

First, Title IX coverage of such entities plainly furthers the statute's purpose of "provid[ing] individual citizens effective protection against [discriminatory] practices." *Cannon*, 441 U.S. at 704. Section 901 of Title IX provides entities with authority over the operations of federally-assisted education programs or activities with ample notice that they are forbidden to discriminate on the basis of sex.[17] When entities with power

[16] *See also* n. 34 *infra*, describing Senator Hatch's understanding of the breadth of Title IX coverage under the CRRA.

[17] *Cf. School Board of Nassau County, Florida* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) ("[t]he contrast between the congressional preference at issue in *Pennhurst [State School and Hospital* v. *Halderman*, 451 U.S. 1, 19 (1981), which was merely precatory] and the antidiscrimination mandate of § 504 [of

and control over federally-assisted education programs are on clear notice that they are liable for their own discrimination, the special class for whose special benefit Title IX was enacted is most effectively protected. Such entities may, at their option, elect not to accept authority over federally-assisted education programs, but, if they do, they have full knowledge that they may not exercise their authority discriminatorily.

Second, holding the entity that is responsible for, and engages in, discrimination liable also deters the "use of federal resources to support discriminatory practices." *Cannon*, 441 U.S. at 704. That entity is most likely to be on notice of that discrimination and has the best (possibly the only) opportunity to institute corrective measures.

This case provides an excellent illustration of both points. The direct Federal assistance recipients, Hofstra and University of Pittsburgh, have assigned substantial authority over their intercollegiate athletics programs, including eligibility decisions, to the NCAA. The NCAA's Postbaccalaureate Bylaw is neutral on its face, and the NCAA may grant waivers of its Bylaws generally to student-athletes at all of its member institutions, not only at Hofstra and University of Pittsburgh. In these circumstances, it is the NCAA which has the clearest notice of, and the best opportunity to correct, the alleged discrimination against student-athletes under federally-assisted education programs and activities. As a result, holding the NCAA liable best serves Title IX's purposes.

2. The NCAA, however, asserts that nonrecipients lack constitutionally adequate notice that they are covered by Title IX and thus cannot be held liable for their sex-based

the Rehabilitation Act of 1973] could not be more stark").

discrimination under a federally-financed education program or activity. Specifically, the NCAA contends that this Court has held that Title IX is an exercise solely of Congress' Spending Power; that statutory prohibitions imposed as a condition of receiving Federal financial assistance create a contract between the Government and a recipient; that only recipients have adequate notice that they may be held liable for violations of the statutory prohibition and an opportunity to accept or reject Title IX coverage; and therefore that only recipients are liable for violations of Title IX. There are numerous flaws in the NCAA's chain of reasoning.

First, contrary to the NCAA, this Court has never held that Title IX is solely a product of the Spending Power. *Gwinnett* expressly left open the question whether Title IX was enacted exclusively pursuant to the Spending Clause, see 503 U.S. at 75 n.8. Other Court decisions appear to acknowledge that Title IX was also enacted on the authority of Section 5 of the Fourteenth Amendment. See *Cannon*, 441 U.S. at 686 n.7 (relying on Congress' reference to its enforcement responsibilities under the Fourteenth Amendment as authority for including Title IX in the amendment of the Civil Rights Attorneys Fees Award Act of 1976); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 732 (1982) (assuming that Title IX is based on Section 5).[18]

Second, and assuming that Title IX was enacted pursuant to the Spending Clause, prohibitions in Spending Clause legislation do not apply solely to those in contractual relationships with the Government. *Grove City* clearly holds

---

[18] The NCAA's implicit argument that in *Gebser* this Court held that Title IX rests solely on the Spending Clause, *see* Pet. Br. at 12, 27 n.14, overreaches. Nothing in the opinion suggests, much less holds, that Title IX is not also based on Congress' authority under Section 5.

that indirect recipients of Federal assistance, such as colleges whose students receive Federal financial assistance, are covered by Title IX. See 465 U.S. at 564 ("[t]here is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the Federal Government are subject to regulation"). Such entities have *no* contractual relationship with the Government; they are third-party beneficiaries of a Government contract with the student.[19] Title IX's coverage is different from the set of entities in contractual privity with the Government, just as remedies for Title IX's violations differ from contract remedies (to wit, return of grant money to the Government). See *Gwinnett, supra*.

This specific point concerning Title IX is generally true of Spending Clause legislation. Recently, in *Salinas* v. *United States*, 118 S.Ct 469 (1997), this Court upheld the constitutionality of the Federal bribery statute, prohibiting the agents of certain Federal assistance recipients from accepting bribes. The indicted agents argued that the statute rendered unlawful only bribes with a demonstrated effect on Federal funds. This Court rejected that argument, upholding Congressional authority to prevent any "threat to the integrity and proper operation of the federal program." *Id.* at 475. As this reasoning demonstrates, Spending Clause legislation permissibly reaches beyond fund recipients to third parties, including agents, in order to serve and protect the Federal program.

The actual reach of Title IX, like that of any Spending Clause legislation, is strongly affected by the purposes of the Federal act. As this Court explained in an analogous context:

---

[19] This aspect of *Grove City* was endorsed by Congress when it enacted the Civil Rights Restoration Act of 1987. *See* S.Rep. 100-64, at 3.

> Although we agree with the State that Title I grant agreements had a contractual aspect, the program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction. Unlike normal contractual undertakings, federal grant programs originate in and remained governed by statutory provisions expressing the judgment of Congress concerning desirable public policy. [*Bennett* v. *Kentucky Dep't of Education*, 470 U.S. 656, 669 (1985) (citations omitted).]

Cf. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 470 (1960). (policy of Federal labor law may alter normal principles of contract law). Title IX's dual purposes of protecting a specified class of persons and ensuring that federally-assisted programs do not operate discriminatorily are best served by covering all entities with authority over the operation of such programs, and the private cause of action should be defined with those purposes in mind.

Finally, the central concern addressed by analogizing Title IX to a contract is that of notice -- notice that discrimination is prohibited and notice of specific instances of discrimination as they occur and an opportunity to take corrective action. As explained in detail *supra* at 26-27, those concerns simply are not implicated where, as here, an entity with authority over a federally-assisted education program or activity is held liable for its own discrimination.[20]

---

[20] The NCAA relies on *Gebser* to argue that it cannot be held liable as an agent or surrogate of its member institutions, Pet. Br. at 27, but *Gebser* supports Smith's position. *Gebser* held that Title IX liability may not be expanded by "application of agency principles," and that education entities are not liable for Title IX violations by their agents and subordinates *unless an official with authority to correct discrimination has knowledge of it and fails*

* * * *

For all of these reasons, Smith's allegation that the NCAA discriminated against her on the basis of sex under an education program or activity that receives Federal assistance states a claim without regard to whether the NCAA itself receives such assistance. Accordingly, Smith is entitled to test her claim against the NCAA on its merits.

II. *The Third Circuit's Judgment That Smith Is Entitled To Amend Her Complaint Should Be Affirmed On The Ground That She Will Reasonably And In Good Faith Allege That The NCAA Receives Federal Financial Assistance.*

The judgment of the court of appeals reversed the district court's denial of Smith's motion for leave to amend her complaint and remanded the case so that Smith could file an amended complaint. See *supra* at 8-9. This Court has often stated that it sits to "review [ ] judgments, not opinions," and that a judgment may be affirmed on any ground supported by the record. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Bennett* v. *Spear*, 117 S. Ct. 1154, 1163 (1997); *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 814 n. 12 (1984). The court of appeals' judgment that Smith was entitled to amend her complaint to allege that the NCAA is a recipient of Federal financial assistance and thus covered by Title IX may be

---

adequately to respond. 118 S. Ct. at 1995-96. Nothing in *Gebser* remotely suggests that an entity with authority over the operation of a federally-assisted program may not be held liable for its own discrimination under Title IX. Indeed, *Gebser* declares that liability should attach to the entity which has notice of, and an opportunity to correct, the conduct alleged to be discriminatory. In this case, that entity is the NCAA.

affirmed most easily on the ground that Smith's amended complaint, in fact, alleges that the NCAA directly and indirectly receives Federal financial assistance and that such an allegation is plainly sufficient to survive a motion to dismiss. Further development of the facts supporting Smith's amended allegations should be left in the first instance for the district court on remand.

A. *The Court Of Appeals Correctly Held That Smith Is Entitled To Amend Her Complaint*

Fed. R. Civ. P. 15(a) instructs that leave to amend a pleading "shall be freely given." Relevant here, "[i]f a motion to dismiss under Rule 12(b)(6) is filed, ordinarily an opportunity to amend should be freely granted if the deficiencies in the complaint can be corrected by amendment." J. Moore, 3 *Moore's Federal Practice* ¶15.08[4] (2d ed. 1994). Such a motion may be denied only if the plaintiff has unduly delayed, acted in bad faith or from a motive to delay, repeatedly failed to cure deficiencies in the complaint through amendments previously allowed, or if the defendant would be unduly prejudiced. See *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). Liberal allowance of amendments to pleadings is particularly appropriate when a pro se plaintiff is involved. See *Hughes* v. *Rowe*, 449 U.S. 5, 9-10 (1980). Applying this standard, the court of appeals correctly held that Smith is entitled to amend her complaint to allege that the NCAA directly and indirectly receives Federal financial assistance.

There is no dispute that a complaint alleging that the NCAA is a direct and indirect recipient of Federal financial assistance and has engaged in sex-based discrimination

prohibited by Title IX would withstand a motion to dismiss.[21] Smith proposed to amend her complaint to allege that "[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." Pet. App. 18a (citation omitted). That proposed amendment can and should be read to allege that the NCAA directly and indirectly receives Federal assistance.[22] In addition, Smith plainly stated in her brief to the court of appeals that she intended to allege that the NCAA receives Federal financial assistance both "directly" and "indirectly," through its administration of the NYSP Fund, and indirectly from its federally-assisted member institutions. See *supra* at 8.[23] The factual bases for Smith's allegation that the

---

[21] Arguably, in consideration of Smith's pro se status, the district court should have construed her original complaint as containing an allegation that the NCAA is a recipient of Federal financial assistance. *See Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (the allegations of a pro se complaint, "however inartfully pleaded" are held "to less stringent standards than formal pleadings drafted by lawyers. . . "); *Boag* v. *MacDougall*, 454 U.S. 364, 365 (1982) (federal courts should construe the inartful pleading of pro se plaintiffs liberally). That point is no longer relevant because, although the court of appeals did not reverse on that ground, its judgment was simply that Smith was entitled to amend her complaint to add allegations.

[22] The proposed amendment plainly encompasses the NCAA's indirect receipt of funds through either the NYSP Fund or member institutions. It also alleges direct receipt of Federal assistance to the NYSP Fund when read as follows: "[t]he NCAA is a recipient of federal funds because it . . . operates an education program or activity which receives or benefits from such assistance."

[23] The NCAA claims that "[i]n *her* court of appeals brief (p. 6), Smith asserted for the first time that the NCAA receives federal funds *indirectly* through the NYSP." Pet. Br. at 13 n. 7. But the quotations from Smith's brief make clear that she, in fact, alleged that the NCAA directly and indirectly receives Federal financial assistance as a result of Federal aid to the NYSP Fund.

NCAA receives Federal assistance directly and indirectly were underlined in the Amicus Brief of the National Women's Law Center. See, *e.g.*, Brief of Amici Curiae at 5 n.3 ("[t]he NCAA receives direct federal funding through a grant from the Department of Health and Human Services to the NCAA's National Youth Sports Program"); *id.* at 15 n.11.

The court of appeals correctly concluded that Smith's proposed amendment would cure the alleged deficiencies in her original complaint. "[I]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman* v. *Davis*, 371 U.S. at 182. The court of appeals also found that Smith had not engaged in any bad faith or dilatory conduct that would support denial of her motion to amend. Pet. App. 19a. Based on this analysis, the court of appeals correctly concluded that the district court abused its discretion when it denied Smith leave to amend. *Id.*[24]

For this reason alone, the court of appeals' judgment vacating the district court's denial of Smith's motion to amend and remanding to allow Smith to file an amended complaint should be affirmed.

---

[24] In determining that Smith was entitled to amend her complaint to allege that the NCAA is a recipient of Federal financial assistance, the court of appeals stated that it was not sure "whether the district court was unaware of its discretion to allow the proposed amended complaint despite the dismissal or whether the court believed that the amendment would be futile even if pleaded," but that under either view, the district court erred. Pet. App. 17a. The district court had discretion to allow a curative amendment even after dismissal, and Smith's allegation that the NCAA directly and indirectly receives Federal assistance cured any perceived defect in her claim. *Id.* 18a-19a.

B. *Smith Clearly Has A Good Faith Basis Upon Which To Amend Her Complaint To Allege That The NCAA Directly Receives Federal Financial Assistance And Is Thus Subject To Title IX*

In a motion for leave to amend a complaint, a plaintiff seeks an opportunity to make allegations that will allow her to introduce evidence into the record. Plainly, in this situation, evidence supporting those allegations need not already be in the record. As described above, in seeking to amend her complaint after dismissal, Smith had only to show that the complaint as amended would survive a motion to dismiss. This Court, like the court of appeals, may assume that Smith has a good faith basis to allege that the NCAA directly and indirectly receives Federal assistance, particularly in light of her specific statements about the NYSP and the NYSP Fund in her brief to the court of appeals (statements supported by the National Women's Law Center).

In any event, it is clear that Smith will be able to support her allegation. During this litigation, Smith learned of two other pending cases addressing the question whether the NCAA directly and indirectly receives Federal financial assistance and is therefore liable for discrimination under the Rehabilitation Act and Title VI, respectively. See *Bowers* v. *NCAA*, 9 F. Supp. 2d 460, 493 (D.N.J. 1998), and *Cureton* v. *NCAA*, Civ. No. 97-131, 1997 WL 634376, at *2 (E.D. Pa., Oct. 9, 1997).

In both of these cases, the plaintiffs alleged that the NCAA receives Federal financial assistance because one of its parts -- the NYSP Fund -- concededly receives substantial Federal aid. And in both cases, the NCAA sought summary judgment on the question whether it receives Federal financial assistance. The NCAA argued that it escapes coverage under the Rehabilitation Act and Title VI because, although it

administers the NYSP, it has set up a separate entity, the NYSP Fund, to receive the Federal money. *E.g.*, *Bowers*, 9 F. Supp. 2d at 493. Both courts, however, denied summary judgment to the NCAA, holding that there are genuine issues of fact concerning whether the NCAA receives Federal financial assistance through the Fund.

The *Bowers* Court explained that an NCAA Committee, the NYSP Committee, administers the NYSP; that the NYSP Board of Directors' powers are limited by the Council of the NCAA; that among the Board members of the NYSP are the Executive Director of the NCAA and the Chair of the NCAA NYSP Committee; that all members of the NYSP Fund Board are employees of the NCAA or members of the NCAA NYSP Committee; that, upon dissolution, any assets of the NYSP Fund belong to the NCAA; and that the NCAA's Executive Director described the NYSP as "'one of the NCAA's best kept secrets'" and characterized it as a "'partnership with the federal government.'" *Bowers*, 9 F. Supp. 2d at 494 (citing exhibits). Based on all of this evidence, the court concluded that the NCAA is not entitled to summary judgment on the question whether it receives Federal financial assistance. *Id.*

In addition, as described in the Statement at 5, the Office of Civil Rights of the Department of Health and Human Services has found the NCAA to be a recipient of Federal financial assistance through the NYSP Fund and thus subject to Title IX's requirements. See *supra* at 5.

These judicial decisions and administrative findings demonstrate that Smith's motion to amend her complaint to add an allegation that the NCAA directly and indirectly receives Federal financial assistance has a good faith basis, and that her

amended complaint would survive a motion to dismiss.[25] In these circumstances, the court of appeals thus correctly reversed the district court's denial of Smith's motion to amend her complaint to cure any pleading deficiencies. See *Papasan* v. *Allain*, 478 U.S. 265, 283 (1986) ("[c]onstruing [the well-pleaded allegations of the complaint] and relevant facts obtained from the public record in the light most favorable to petitioners, we must ascertain whether they state a claim on which relief could be granted").

III. *The NCAA Indirectly Receives Federal Financial Assistance And Is Therefore Subject To Title IX.*

This Court stated in *Grove City College* v. *Bell*, 465 U.S. 555, 564 (1984), that "[t]here is no basis in [Title IX] for the view that only institutions that themselves apply for federal aid or receive checks directly from the Federal Government are subject to regulation" and that, for purposes of Title IX coverage, there is no "distinction between direct and indirect aid." Indirect recipients of Federal aid for education programs

---

[25] As stated above, Smith is not required to cite record evidence to support her motion to amend to add allegations to her complaint. In any event, though, the Court may take judicial notice of the two federal district court decisions and the administrative findings which demonstrate that Smith did, in fact, have a good faith basis to amend. Under Federal Rule of Evidence 201(b), a court may take judicial notice of matters outside of the record if they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The fact that two federal district courts have denied the NCAA summary judgment on the question whether it receives Federal financial assistance falls into this category, as does the fact that the Office of Civil Rights of the Department of Health and Human Services has determined that the NCAA receives Federal financial assistance.

and activities are thus subject to Title IX.[26] See also 34 C.F.R. §106.2(h) (defining a "recipient" of federal funds as an entity which receives federal funds "directly or through another recipient," and "operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof").

In enacting the CRRA, Congress made clear its agreement with this holding of *Grove City*. See, *e.g.*, S. Rep. No. 100-64, at 3. In addition, in the CRRA, Congress amended Title IX to define the phrase "program or activity" as "all of the operations of" specified education entities "any part of which is extended Federal financial assistance." The CRRA definition specifies when direct Federal aid to *part* of an education entity constitutes aid to the *whole* entity and, pertinent here, when direct Federal aid to a *single* education entity constitutes indirect aid to *related* education entities.

The NCAA indirectly receives Federal assistance in two ways: First, assuming *arguendo* that the NCAA does not directly receive assistance provided to the NYSP Fund, the NCAA certainly receives such assistance indirectly. Second, the NCAA indirectly receives Federal assistance from its member institutions when the latter assign operation of intercollegiate athletics programs to the NCAA and provide the NCAA with dues and other assistance to carry out the assignment.

---

[26] Indeed, Congress has twice rejected attempts to narrow Title IX's coverage to education programs or activities that directly receive Federal financial assistance. *See* 121 Cong. Rec. 23845-47 (1975) (rejecting proposed amendment limiting Title IX coverage to programs or activities that directly receive Federal assistance); 122 Cong. Rec. 28144, 28148 (1976) (rejecting proposed amendment "that would have defined federal financial assistance as 'assistance received by the institution directly from the federal government'")(quoted in *Grove City*, 465 U.S. at 568 n.19).

A. *The NCAA Indirectly Receives Federal Assistance Through the NYSP Fund.*

1. Assuming *arguendo* that the NCAA does not directly receive the Federal financial assistance provided to the NYSP Fund, Smith nonetheless has grounds to allege that the NCAA indirectly receives that assistance. The evidence described by the court in *Bowers*, see *supra* at 35-36, supports a claim that the NYSP is effectively governed and operated by the NCAA. Thus, although the Federal aid goes directly to the NYSP Fund, the Fund is alleged to serve only as a conduit for conveyance of the aid to the NCAA. In addition, if the Fund were established to avoid coverage under Title IX and related statutes, the case for attributing indirect receipt of the Federal assistance to the NCAA might be even stronger.[27] In these circumstances, an allegation that the NCAA indirectly receives Federal assistance subjects it to Title IX coverage, and the court of appeals' judgment that Smith was entitled to amend her complaint may be affirmed on this independent ground.

2. The CRRA, too, makes clear that the NCAA is an indirect recipient of Federal assistance through the NYSP Fund. The CRRA defines "program or activity" broadly so that Title IX forbids discrimination under "all of the operations of"

---

[27] Some evidence in *Bowers* and *Cureton* suggests that the Fund may have been established by the NCAA solely to avoid liability under the civil rights statutes that apply to entities operating programs receiving Federal financial assistance. *See Bowers*, 9 F. Supp. 2d at 493-94; Exhibits to Plaintiff's Cross-Motion for Summary Judgment and Opposition to NCAA Motion for Summary Judgment in *Cureton*, *supra* (lodged with the Court by *amicus* Trial Lawyers for Public Justice).

specified education entities "any part of which is extended Federal financial assistance." 20 U.S.C. §1687.[28]

The NCAA is one of the education entities specified by the CRRA. It meets the requirements of subsection 1687(4), because it is an entity established by two or more federally-assisted colleges and universities. The NCAA also satisfies the requirements of subsection 1687(3)(ii), because it is a "private organization" which is "principally engaged in the business of providing education." The facts alleged in *Bowers* support the

---

[28] In pertinent part, the CRRA defines "program or activity" as follows:

> For the purposes of this section, the term "program or activity" means *all of the operations of* --
>
> . . .
>
> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or
>
> . . .
>
> (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --
>
> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
>
> . . .
>
> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance. 20 U.S.C. 1687 (emphasis supplied.)

allegation that the NYSP Fund is properly considered an "operation" of the NCAA or a "part" of the NCAA within the meaning of Title IX, and there is no dispute that the Fund "is extended Federal financial assistance."

The NCAA thus indirectly receives Federal financial assistance through the NYSP Fund, because the Fund directly receives Federal assistance and is an "operation" or a "part" of the NCAA within the meaning of the CRRA. The court of appeals' judgment that Smith is entitled to amend her complaint to allege that the NCAA indirectly receives Federal financial assistance may be sustained on this basis alone.

B. *The NCAA Indirectly Receives Federal Assistance Because It Operates A Federally-Assisted Education Program Or Activity And Receives Funds From Direct Recipients To Do So.*

1. Hofstra and University of Pittsburgh are members of the NCAA and, like most NCAA member institutions, directly receive Federal financial assistance. Each sponsors intercollegiate athletics. Hofstra, University of Pittsburgh, and the other NCAA member institutions have paid dues and provided other benefits to a joint enterprise, the NCAA, and assigned to that joint enterprise operation of their intercollegiate athletics programs. In these circumstances, as we now show, the NCAA is properly considered an indirect recipient of Federal financial assistance from its member institutions.

The NCAA is not akin to run-of-the-mine downstream payees of a federally-assisted education institution (*i.e.*, a power company or paper goods supplier). And we certainly do not contend that such payees would be covered by Title IX. The

NCAA accepts from its member institutions an assignment of substantial authority over a federally-assisted education program, *viz*, intercollegiate athletics. The assignment "'transfer[s] to [the NCAA] all or part of [the member institution's] property, interest, or rights,'" including the right to govern and operate the Federally-assisted education program at issue. See *Holywell Corp.* v. *Smith*, 503 U.S. 47, 53 (1992). By accepting the assignment, the NCAA accepts responsibility for a federally-assisted education program, along with funds to operate that program.[29] The NCAA should also be deemed to have accepted the legal obligations that accompany authority over a federally-assisted education program, including the obligation not to engage in sex-based discrimination.[30]

This conclusion is supported by this Court's decisions holding that, where an entity accepts assignment of a duty or a function, that entity generally takes on the legal obligations attached to that duty or function. Cf. *West* v. *Atkins*, 487 U.S. 42, 56 (1988) (holding that when a doctor "voluntarily assumed [the State's obligation to provide adequate medical care to a prisoner] by contract," that doctor became a State actor with accompanying constitutional responsibilities); *Terry* v. *Adams*, 345 U.S. 461, 466 (1953) (holding that a private organization

[29] Moreover, at this stage of the litigation, on a motion to dismiss, there is no record evidence concerning whether Hofstra or University of Pittsburgh receive Federal funds intended to operate intercollegiate athletics or concerning the nature and amount of funds (dues or otherwise) transferred from the schools to the NCAA.

[30] This conclusion finds support in the regulations implementing Title IX. These regulations extend coverage to the "assignee[s]" of direct recipients of Federal funds, 34 C.F.R. §106.2(h). *See also NCAA* v. *Kansas Dep't of Revenue*, 781 P.2d 726, 730 (Kan. 1989) (holding that NCAA is entitled to tax exempt status because it "is but an extension of the member institutions and colleges").

which succeeded to the State's control over the political primary process was subject to the State's legal obligation not to discriminate; the right to vote may "'not be nullified by a State through casting its electoral process in a form which permits a private organization to practice race discrimination in the election'").[31] Cf. Restatement (Second) Contracts, § 318 (cmt. d (1979)) ("[t]he obligee may, however, have rights against the [assignee of the obligor] as an intended beneficiary of the promise to assume the duty").

In addition, because of the unique nature of intercollegiate athletics, it is particularly appropriate to treat the NCAA as an indirect recipient of Federal financial assistance from its member institutions. Intercollegiate athletics is one of few education programs of a college or university which cannot be conducted without creation of a separate institution to provide governance, administration, and certain operations. See

[31] Nothing in *NCAA* v. *Tarkanian*, 488 U.S. 179 (1988), suggests a different result. *Tarkanian* sets forth the test for determining when a private actor becomes a state actor and thus may be held liable for a variety of constitutional violations. *Id.* at 192. The test for determining whether an entity has received Federal assistance is distinct and less demanding. An entity need not be either a state actor or even a direct recipient of Federal assistance to be liable for a Title IX violation. An entity which takes on authority over, and the operation of, a federally-assisted education program or activity and accepts funds to do so, however, has taken on the responsibilities and duties of a Federal fund recipient and should be deemed an indirect recipient of such funds.

Moreover, in *Tarkanian*, this Court concluded that the NCAA had not actually taken on responsibility for the decision of its member institution to discharge the State employee. *Id.* at 197-98. Here, the NCAA plainly has obtained from its member institutions full authority to govern eligibility for participation in intercollegiate athletics, and member institutions may not participate in intercollegiate athletics unless they abide by the NCAA's decisions. The legal obligation of the federally-assisted member institutions to refrain from discrimination should thus be attributed to the NCAA.

NCAA v. *Board of Regents*, 468 U.S. 85, 101, 117 (1984) (recognizing that for intercollegiate athletics to exist, a "myriad of rules . . . must be agreed on" and that "a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved"). Thus, creation of a separate entity is necessary for the existence of intercollegiate athletics, but that separation is strictly a consequence of the inherent nature of the program and should not shield the NCAA from liability if it discriminates while operating a federally-assisted education program using funds received from its federally-assisted member institutions.

Finally, the attribution of recipient status to the NCAA is also supported by the weight of lower court authority. See *Horner* v. *Kentucky High School Athletic Ass'n*, 43 F.3d 265, 271-72 (6th Cir. 1994) (holding that the Kentucky High School Athletic Association indirectly receives Federal funds because a direct fund recipient, the State Board of Education, has delegated to it governance of the State's interscholastic athletic programs, and because direct fund recipients, member schools, provide it with funds to conduct the delegated activity).[32]

---

[32] *See also Pottgen* v. *Missouri State High School Activities Ass'n*, 857 F. Supp. 654, 663 (E.D. Mo.) (holding the Missouri High School Activities Association subject to section 504 of the Rehabilitation Act of 1973 because it "receives federal funds indirectly through its members, which delegate to it a portion of their responsibilities for regulation of interscholastic activities"), *rev'd on other grounds*, 40 F.3d 926 (8th Cir. 1994) ; *Sandison* v. *Michigan High School Athletic Ass'n*, 863 F. Supp. 483, 487 (E.D. Mich. 1994) (holding Michigan High School Athletic Association subject to section 504 of the Rehabilitation Act because it receives funds and facilities from direct recipients to carry out interscholastic athletic functions), *reversed in part, and appeal dismissed in part*, 64 F.3d 1026 (6th Cir. 1995); *Dennin* v. *Connecticut Interscholastic Athletic Conference*, 913 F. Supp. 663, 667 (D. Conn.) (same), *appeal dismissed as moot*, 94 F.3d 96 (2d Cir. 1996); *Graham* v. *Tennessee Secondary School Athletic Ass'n*, No. 1:95-CV-044, 1995 WL 115890, at *11 (E.D. Tenn. Feb. 20, 1995) (holding Tennessee Secondary

There is broad language in the court of appeals' opinion suggesting -- in substantial tension with *Paralyzed Veterans* -- that mere beneficiaries of Federal assistance programs might be subject to Title IX. The opinion below relies on a Department of Education regulation in support of this expansive interpretation. The NCAA understandably seizes upon this language and then devotes virtually its entire analysis to destroying this straw man. No doubt, the NCAA hopes that this effort will divert the Court's attention from the NCAA's actual status. But it is no mere beneficiary of Federal assistance and the court of appeals' decision to permit Smith to amend her complaint to state claims against the NCAA under Title IX does not in any way depend on the over broad language in the opinion below.

To the contrary, the NCAA has been assigned authority to operate a federally-assisted education program and been provided funds from a federally-assisted education institution to carry out that assignment. The suggestion that by interpreting Title IX to preclude the NCAA from using its peculiar status to exclude women systematically from intercollegiate athletic opportunities through an inherently arbitrary waiver policy will dramatically expand the pool of potential Title IX defendants is fanciful. Petitioner's hyperbole simply ignores the fact that the vast majority of recipients retain authority over their education-related operations and the fact that the relationship between the NCAA and intercollegiate athletics is *sui generis*.

School Athletic Association subject to Title VI of the Civil Rights Act of 1964 because a direct fund recipient delegated to it the responsibility "to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis") (internal quotation omitted), *appeal dismissed*, 107 F.3d 870 (6th Cir. 1997).

In sum, respondent does not embrace the suggestion below that the statute and regulation can fairly be understood to apply to mere beneficiaries. Where respondent parts company with the NCAA is in leaping from that quibble about the opinion below to the conclusion that the Third Circuit's judgment is fatally flawed. On that score the NCAA is simply wrong.

In the circumstances presented here, the Federal assistance received by NCAA members is properly attributed to the NCAA.[33]

2. The NCAA also indirectly receives Federal assistance as described by the CRRA because it is an "operation" of its federally-assisted member institutions, including Hofstra and University of Pittsburgh. See 20 U.S.C. §1687 (defining "program or "activity" as "all of the operations of . . . (2)(A) a college [or] university . . . any part of which is extended Federal financial assistance"). The operation of intercollegiate athletics programs requires some joint governance and administration, and, for that reason, the NCAA is an "operation" of multiple institutions. But the NCAA's authority over the operations of numerous federally-assisted education programs and activities only heightens its ability to injure others with discrimination, and does not shield it from coverage as a "program or activity" under the CRRA.

---

[33] The NCAA does not resemble an ultimate beneficiary of Federal education assistance, because it receives funds from federally-assisted colleges and universities in order to operate an education program which, in turn, serves ultimate beneficiaries (here, students). These circumstances plainly distinguish this case from *Paralyzed Veterans, supra* where this Court held that a mere beneficiary of Federal assistance is not subject to the prohibitions of statutes forbidding discrimination under federally-assisted programs and activities.

This reading of the statutory language finds strong support in the legislative history of the CRRA. Congress intended that the CRRA be given the "broadest interpretation." S. Rep. 100-64 at 5, 7.[34] As noted above, its concern was "with state agencies, the educational institutions and *others* who operate programs or conduct activities providing services to others and who are in a position to injure ultimate beneficiaries through discrimination." *Id.* at 25 (internal quotations omitted; emphasis added).[35] Indeed, the NCAA itself testified in opposition to the bill that became the CRRA based on its belief that athletic conferences would be subject to Title IX if their member institutions were. See *supra* at 25. That same, accurate reading of the CRRA's meaning sweeps in the NCAA as an "operation" of federally-assisted education institutions.

* * * *

For each of these reasons, the NCAA indirectly receives Federal financial assistance, and the court of appeals correctly held that Smith was entitled to amend her complaint to make such an allegation.

---

[34] *See also* 133 Cong. Rec. S2249-51 (1987) (remarks of Sen. Kennedy); *id.* at S2251 (remarks of Sen. Weicker).

[35] Senator Hatch gave the following examples of the breadth of coverage established by the "all of the operations of" language in the CRRA:

> If a research hospital receiving Federal aid establishes a research laboratory jointly with a pharmaceutical company, and the research laboratory does not receive Federal aid, it is covered because it is an "operation of" the hospital. ....
>
> The same result occurs if the private entity joins with a public entity to create a joint venture or if two public entities join to create a third entity (*i.e.*, "all operations" of entities listed in paragraphs (1) and (2) are also covered). Such "operations" include subsidiaries and newly established entities, even if created with other organizations. [133 Cong. Rec. S2431 (1988).]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Carter G. Phillips *
Virginia A. Seitz
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20008
(202) 736-8015

*Counsel of Record

December 8, 1998

(10)

FILED
DEC 23 1998
CLERK

No. 98-84

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R. M. SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR PETITIONER

ELSA KIRCHER COLE
General Counsel
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
6201 College Boulevard
Overland Park, KS 66211
(913) 339-1906

MARTIN MICHAELSON
JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5810

JOHN J. KITCHIN
ROBERT W. MCKINLEY
SWANSON, MIDGLEY, GANGWERE, KITCHIN & MCLARNEY
922 Walnut Street
Suite 1500
Kansas City, MO 64106
(816) 842-6100
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

2488

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-84

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,
v.
R. M. SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

I. THE COURT SHOULD DEAL WITH THIS CASE AS IT CAME HERE AND SET ASIDE THE THIRD CIRCUIT JUDGMENT.

This Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Med. Center, Inc.*, 485 U.S. 80, 86 (1988). *See Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2205 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari."). Doing so here should result in reversal—or, at a minimum, vacatur—of the judgment below, because there is no longer any serious dispute that the sole ground relied upon by the Court of Appeals to enter judgment in respondent's favor was wrong. Because respondent and her amici show faint—or, in the case of the Solicitor General, no—interest in defending that ground, we begin by restating the Third Circuit ruling.

The Third Circuit held that respondent's amended complaint states a Title IX claim because "the NCAA receives dues from member institutions, which receive federal funds." Pet. App. 19a. The receipt of such dues, the court held, "would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds." *Id.* The resulting judgment set aside the District Court dismissal order and "remanded * * * for further proceedings *in accordance with the opinion of this Court*." *Id.* 37a-38a (emphasis added). In "accordance with th[at] opinion," all respondent would have to prove on remand to trigger Title IX is that the NCAA receives membership dues—a fact not in dispute. *Id.* 38a.[1]

The petition thus presented the question whether the Third Circuit correctly held that the NCAA is subject to Title IX based on the receipt of such payments. *See* Pet. i.[2] As we explained in our opening brief, the answer to that question is plainly no. In her brief, respondent does not seriously attempt to defend the Third Circuit ruling on its terms; quite the contrary, she disavows them.[3] The

[1] Respondent is wrong that the "judgment was simply that Smith was entitled to amend her complaint to add allegations." Resp. Br. 33 n.21. The judgment—which is reprinted at Pet. App. 37a-38a and speaks for itself—says nothing of the sort. It does, however, make express that the proceedings on remand must be "in accordance with the [Third Circuit] opinion." *Id.* 38a. Thus, if permitted to stand, the judgment would require the case to proceed under what even the Solicitor General acknowledges is an "incorrect legal standard." U.S. Br. 7.

[2] Respondent and her amici have attempted to overhaul that question to suit their chameleon-like theory of the case. Indeed, respondent switched questions from her opposition to her merits brief. But of course the settled "rule" is "that it is the petition for certiorari (not the brief in opposition and later briefs) that determines the questions presented." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993); *see id.* at 281 n.10. And this Court has long "disapprove[d]" of "the practice of smuggling additional questions into a case after [it] grant[s] certiorari." *Irvine* v. *California*, 347 U.S. 128, 129 (1954) (Jackson, J.).

[3] *See* Resp. Br. 45 (conceding that the "broad language in the court of appeals' opinion" is "in substantial tension with *Paralyzed*

Solicitor General goes further, taking the Court of Appeals to task for applying "an incorrect legal standard," and arguing that the Third Circuit "holding that petitioner's receipt of dues makes it a recipient is tainted by legal error." U.S. Br. 7; *see id.* 10-15. Because the Third Circuit judgment directs the case to proceed on the basis of that incorrect legal standard—"in accordance with [its] opinion," Pet. App. 38a—and because application of that standard would subject the NCAA to Title IX solely on the basis of its receipt of dues, the judgment should be set aside.

Far from dealing with the case that came to this Court, respondent and her amici devote their efforts to reinventing it. In the process, they cast aside the basic ground rules for adjudication in this Court, urging the Court to affirm based on a dizzying array of new arguments and grounds that are not within the question presented (or even close to it), were not properly raised below, were not considered by the courts below, and are not supported by the record in this case. To justify these tactics, respondent and her amici cling to the rule that a respondent may defend a judgment on alternative grounds. But, as this Court's decisions make clear, that rule plainly does not sanction the type of freestyle, moving-target litigation respondent and her amici seek to thrust upon the Court and the NCAA here.

"While it is true that a respondent may defend a judgment on alternative grounds, [this Court] generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996).[4] That is especially so

Veterans"); *id.* 46 ("respondent does not embrace the suggestion below that the statute and regulation can fairly be understood to apply to mere beneficiaries").

[4] *Accord Cass County, Minn.* v. *Leech Lake Band of Chippewa Indians*, 118 S. Ct. 1904, 1911 n.5 (1998); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 61 n.10 (1996); *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 400 n.7 (1996); *Hudson* v. *McMillian*, 503 U.S. 1, 12 (1992); S. Ct. Rule 14.1.

where, as here, the arguments not only were not considered by the lower courts, but were not properly raised below and are not supported by the record. In such circumstances, the Court typically sets aside the lower court judgment based on the erroneous ground, and remands to allow the lower courts—in the first instance—to consider the new arguments, including whether they have been waived. *See, e.g., Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 551-552 n.3 (1990); *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 812-813 (1985).

There is no reason to depart from that settled practice here. Accordingly, the Court should decide the question presented, set aside the Third Circuit judgment erroneously subjecting the NCAA to Title IX solely on the basis of its receipt of dues, and, if the Court believes it appropriate to do so, remand for consideration of respondent's newly minted arguments—including whether they have been properly raised.[5]

II. THE NCAA IS NOT COVERED BY TITLE IX AS A NON-RECIPIENT.

Respondent begins by arguing—for the first time in this case—that Title IX applies to the NCAA, "whether or not it receives Federal assistance." Resp. Br. 18. In support of this lavish conception of Title IX coverage, respondent argues that Title IX prohibits "discrimination '*under* any education program or activity receiving

[5] In our opening brief, we addressed respondent's alternative "surrogate" argument for subjecting the NCAA to Title IX. *See* Pet. Br. 22-35. Both the District Court and the Court of Appeals, however, had addressed that argument in considering whether the NCAA is subject to Title IX on the basis of "the relationship between the members of the NCAA and the organization itself." Pet. App. 16a; *see id.* 14a, 32a-33a; Pet. 21 n.13. Respondent all but abandons this argument in her merits brief, and it is easy to see why—even the Solicitor General agrees that the NCAA cannot be covered by Title IX on the basis of its "unique relationship with its member schools." U.S. Br. 15.

Federal financial assistance,' " not "*by* any education program or activity receiving [such] assistance." *Id.* 17 (quoting Title IX). Based on the same construction, the Solicitor General similarly argues that the determination whether Title IX applies in this case "does not depend solely on whether [petitioner] is a recipient." U.S. Br. 20; *see id.* 21.

This argument should sound familiar to the Court; it was advanced last Term in support of the petitioner's position in *Gebser* v. *Lago Vista Independent School District*, 118 S. Ct. 1989 (1998). *See* Pet. Br. in No. 96-1866, at 18 (arguing that Title IX bars "discrimination 'under any educational program' "); Reply Br. in No. 96-1866, at 5 ("Title IX does not simply prohibit discrimination by the school district; it protects individuals from being subjected to discrimination 'under' a funded program or activity."); U.S. Br. in No. 96-1866, at 19 (same). The argument was unavailing in *Gebser*, and is no more persuasive here.

Perhaps because of the reception the argument received in *Gebser*, respondent and the Solicitor General tailor the construction to the specific objective at hand—extending Title IX to the non-recipient NCAA. Thus, while their theory is still premised on the notion that Title IX reaches any discrimination "under" a federally assisted program—"regardless of whether [the alleged discriminator] is itself a recipient," U.S. Br. 20—respondent and the Solicitor General claim that in this case the Court need only hold that Title IX extends to non-recipients that have been "ceded controlling authority" or "effective control" over such a program. *Id.* 20, 21; *see* Resp. Br. 20. According to the Solicitor General, Title IX is "most naturally read" in this fashion. U.S. Br. 21; *accord* Resp. Br. 17. But of course, there is nothing "natural" about this result-oriented interpretation of Title IX, a statute that says nothing at all about "ceded authority" or "effec-

tive control," and has been consistently interpreted to apply only to recipients of federal aid.[6]

As we explained in our opening brief (pp. 10-13), the language, purpose, and origin of Title IX plainly limit the statute's reach to recipients. *Paralyzed Veterans* holds as much. Even the Solicitor General acknowledges that "[t]here are statements in [*Paralyzed Veterans*] that support petitioner's argument that federal funding statutes like Title IX apply only to recipients of federal financial assistance." U.S. Br. 27. Indeed. *Paralyzed Veterans* makes plain that "Congress limited the scope of [the program-specific statutes] to those who actually 'receive' federal financial assistance because it sought to impose * * * coverage as a form of contractual cost of the recipient's agreement to accept the federal funds." 477 U.S. at 605. *See id.* at 606 (Congress "limit[ed] coverage to recipients"). When it enacted the CRRA, Congress specifically embraced *Paralyzed Veterans*' interpretation of the federal-funding trigger. *See* Pet. Br. 31-32; U.S. Br. 15.

As Spending Clause legislation, Title IX could extend no further. This Court specifically relied upon Title IX's "contractual nature" as Spending Clause legislation in rejecting the effort to extend coverage beyond recipients in *Paralyzed Veterans*, 477 U.S. at 605, and in refusing to expand Title IX liability to cover the acts of non-recipients in *Gebser*, 118 S. Ct. at 1998. *See* Pet. Br. 17-18.[7] The Title IX contract is the thread that holds this Court's Title IX jurisprudence together; there is no reason to unravel it here, simply for the purpose of extending coverage to the NCAA.[8]

Confronted with the Spending Clause, respondent and her amici try a different tack. First, they urge this Court to invoke some kind of inherent authority to extend Title IX to the non-recipient NCAA, tautologically citing *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. at 71, for the proposition that "[f]ederal courts have the power to 'award any appropriate relief' necessary to remedy a

---

[6] The seat-of-the-pants nature of this interpretation is underscored by the Solicitor General's caveat that "[t]here is an important difference between the scope of petitioner's obligation as a controlling authority and the scope of its obligations if it is found to be the recipient itself." U.S. Br. 21 n.3. According to the Solicitor General, "[i]f the petitioner is a recipient, all of its operations are covered by Title IX"; but "[i]f petitioner is not a recipient, it is covered by Title IX only to the extent that it exercises controlling authority over the [program]." *Id.* This distinction not only finds no support in the statute, but directly contradicts the principle of institution-wide coverage codified in 20 U.S.C. § 1687.

[7] Respondent claims that *Grove City College* v. *Bell*, 465 U.S. 555 (1984), proves her point that Title IX may be extended beyond recipients that have entered into a "contractual relationship with the Government." Resp. Br. 29. But that case arose because the federal government demanded that the college execute a written assurance—*i.e.*, contract—"agree[ing] to '[c]omply * * * with Title IX.'" 465 U.S. at 560 (quoting assurance). Because the Court concluded that the college was the congressionally intended recipient of the federal aid to students, it held that the government could "demand that the College execute [such] Assurance." *Id.* at 574. Far from advancing respondent's cause, therefore, *Grove City* underscores the contractual nature of Title IX.

[8] As we explained in our opening brief (pp. 17-18), the notice required in implementing Spending Clause legislation alone precludes extending Title IX to the NCAA. Respondent and the Solicitor General disingenuously suggest that there is no notice problem because respondent seeks to hold the NCAA liable only for its own alleged acts. Resp. Br. 30; U.S. Br. 9, 25. But the notice to which the NCAA is entitled before Title IX may be enforced against it is that it is covered. *See Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) (emphasis added) ("There can, of course, be no knowing acceptance if a [recipient] is unaware of the conditions [to which it will be held] or is unable to ascertain what is expected of it."); Pet. Br. 17-18. That is why the agency requires all recipients—direct or, as *Grove City* indicates, indirect—to execute written assurances agreeing to comply with Title IX. *See* 34 C.F.R. § 106.4. *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992) and *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985)—cited by the Solicitor General (Br. 25)—are by no means to the contrary; they involved school district defendants that had indisputably entered into the Title IX contract.

violation." Resp. Br. 21 (quoting *Franklin*). But it was clear that the defendant in *Franklin*—a public school district—was covered by Title IX as a recipient; the question was "what remedies are available" when Title IX is enforced against a *recipient* through an implied right of action. 503 U.S. at 65.

Next, they cite *Salinas* v. *United States,* 118 S. Ct. 469 (1997), for the proposition that "Congress has constitutional authority to reach the conduct of anyone who threatens 'the integrity and proper operation of [a] federal program.' " U.S. Br. 26; *see* Resp. Br. 29. But even accepting that premise,[9] the question in this case is not whether Congress could regulate the NCAA, if it chose to. It is whether Congress intended Title IX, as enacted, to apply to non-recipients such as the NCAA. As we have explained, the answer to that question is plainly no, a conclusion that is alone compelled by "Title IX's contractual nature." *Gebser,* 118 S. Ct. at 1998.

The notion that Title IX applies to non-recipients involved in, or even responsible for, the operation of federally assisted programs is also contradicted by the regulations. As the Solicitor General acknowledges, the Title IX regulations "impose obligations only on *recipients,*" which of course squares with the statute. U.S. Br. 24 n.4 (emphasis added). *See* Pet. Br. 32-33. And—as the Solicitor General points out—simply "operating an education program that benefits from federal financial assistance is *not* sufficient by itself to make an entity a recipient." U.S. Br. 13 (emphasis added). Yet that is precisely the standard that respondent and, in effect, the Solicitor General ask this Court to adopt, arguing—in the face of not only the regulations, but also the statute and this Court's precedents—that "[Title IX] is best read to extend coverage to all entities with authority over the operation of federally-assisted programs or activities," "whether or not [they] receive[] federal assistance." Resp. Br. 18.

[9] As the Court made clear in the very paragraph upon which respondent and the Solicitor General rely, the Court's decision in *Salinas* was directed to the discrete issue of "the constitutionality of [18 U.S.C.] § 666(a)(1)(B) as applied to the facts of this case," an issue about which there was "no serious doubt." 118 S. Ct. at 475. The language quoted by respondent and the Solicitor General is plucked from a sentence that does not come close to stating the general rule set forth by respondent and the Solicitor General here. *See id.* ("The preferential treatment accorded to him was a threat to the integrity and proper operation of the federal program.").

In addition, even if it had footing in the statute or this Court's precedents, the "control" test has little to commend it as a practical matter. "Controlling authority" or "effective control" (U.S. Br. 21, 22) is a murky, fact-specific concept ill-suited for a threshold jurisdictional determination such as whether Title IX—or the other program-specific statutes with the same federal funding trigger—apply. *See* Pet. Br. 24-25. Indeed, while respondent and her amici baldly assert that "[t]he NCAA was assigned authority over the operation of federally-assisted intercollegiate athletic programs," Resp. Br. 11, this is news to the NCAA. As we explained in our opening brief (p. 23), the NCAA constitution provides that "[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the *institution itself.*" NCAA const. art. 6.01.1 (emphasis added). *See also id.* art. 1.2 (a fundamental purpose of the NCAA is "[t]o uphold the principle of institutional control of, and responsibility for, all intercollegiate sports"). To be sure, the NCAA plays an important role in intercollegiate athletics; but, at the same time, there is no basis for concluding that colleges and universities have simply turned over the store to it, as respondent and her amici suggest.[10]

[10] Respondent refers to the alleged "assignment" of authority from colleges and universities to the NCAA as if there were some kind of formal instrument with which we should all be familiar. *See* Resp. Br. 41, 42. There is not. If there were, one would expect to find it in the NCAA constitution. But, as discussed, that charter adopts as one of its canons "[t]he principle of *institutional* control and responsibility" over intercollegiate athletics. NCAA const. art. 2.1 (emphasis added).

Moreover, while respondent would purport to limit the Title IX liability of non-recipients to the "unusual circumstance where an entity with authority over a federally-assisted program is not the entity that receives Federal assistance," Resp. Br. 12, this limitation is entirely superficial. If—as respondent and the Solicitor General assert—the implied right of action under Title IX imposes liability for any "discrimination '*under* any education program or activity receiving Federal financial assistance,'" *id.* 17 (quoting Title IX); *see* U.S. Br. 20-21, liability should be imposed on *everyone* acting under such a program—from the faculty responsible for implementing the institution's educational program, to the company hired to bus students to and from school, to the concessionaire hired to sell soft drinks at the school's athletic events—even though none of these individuals or entities has entered into the Title IX contract, or is an intended target of the statute. Federal funding recipients—especially educational institutions—depend on scores of others to implement their programs. Adopting the "ceded authority" argument here would render all of these third parties vulnerable to Title IX actions.[11]

Finally, respondent's policy argument that Title IX "must cover the NCAA," or else "it cannot conceivably achieve its goal," proves too much. Resp. Br. 1, 43-44. While new gains may always be made, Title IX—as respondent's own amici note, *see* Nat'l Women's Law Center ("NWL") Br. 25-26—has been very successful since its enactment in 1971 in leveling the playing field for women and men in intercollegiate athletics. During this period, Title IX has never been enforced against the NCAA. The reason is plain: no one—least of all the federal government, which took a contrary position in the *Califano* case—believed Title IX applied to the NCAA. *See* Pet. Br. 33-34. At the same time, the agency crafted a regulatory scheme that subjects recipient institutions to Title IX liability for any discrimination in intercollegiate athletics, and specifically provides that their duty to comply with Title IX "is not obviated or alleviated by any rule or regulation of any * * * athletic * * * association" to which they belong. 34 C.F.R. § 106.6(c).

[11] Respondent claims that holding that Title IX extends beyond recipients would not threaten individuals. *See* Resp. Br. 19 n.12. The Solicitor General is more forthright, saying the question is not presented here. U.S. Br. 27-28 n.5. But the writing is on the wall. If Title IX were extended to non-recipient entities that operate federally assisted programs, there would be no straight-faced basis for concluding that individuals with the same authority are not covered.

In the early days of this regime, concern was expressed—similar to that expressed by respondent and her amici here—that this scheme would be ineffective because it would leave colleges and universities with a dilemma in deciding whether to abide by athletic association rules or determinations that might subject them to Title IX actions. In response, the agency held firm to its regulations, explaining that athletic association "rules do not prohibit choices that would result in compliance with Title IX," and, in any event, "[s]ince all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve collectively any wide-spread Title IX compliance problems resulting from association rules." 44 Fed. Reg. 71413, 71422 (Dec. 11, 1979). Despite the sky-is-falling tone of respondent's amici, that regulatory regime has proved successful in reducing gender discrimination in intercollegiate athletics, while at the same time respecting Title IX's congressionally intended and constitutionally permissible reach. *See* Pet. Br. 34-35.

III. THE NCAA IS NOT COVERED BY TITLE IX AS A RECIPIENT.

Tellingly, respondent does not argue that the NCAA is covered by Title IX as a *recipient* until more than two-thirds of the way through her brief. When she does, she focuses on "a claim not addressed by the [Court of Appeals], not presented by the question on which [the Court] granted certiorari, and accordingly, not before this Court," *Hudson* v. *McMillian*, 503 U.S. at 12—*i.e.*, that the NCAA receives federal funds through the National Youth

Sports Program Fund ("NYSP").[12] As discussed above, this Court's practice is to decline to entertain such arguments in the first instance, without the benefit of lower court decisions and a fully developed record. *See, e.g., United States* v. *Bestfoods*, 118 S. Ct. 1876, 1890 (1998) (declining to "decid[e] in the first instance an issue on which the trial and appellate courts did not focus," and stating that "[p]rudence thus counsels us to remand"); *supra* at 3. There is no reason to plunge forward in the absence of such a record or consideration below here.

In any event, respondent's argument that the NCAA is a direct recipient of the grant to the NYSP, *see* Resp. Br. 35-36, fails for two independent reasons. First, however broadly it is construed, the amended complaint does not allege that the NCAA is a direct recipient of *any* federal aid, let alone the NYSP's. *See* note 18, *infra*. Second, as respondent herself acknowledges (Br. 36), the NYSP—a duly incorporated Missouri corporation—is a "separate entity" from the NCAA. There is no basis, therefore, for characterizing the "separate" NYSP as "part" of the

[12] As we explained in our opening brief (p. 13 n.7), respondent first mentioned this argument—consisting, *in toto*, of two sentences in her 25-page appellate brief, *see* Br. for Appellant (3d Cir.) at 5, 22—in the Court of Appeals. And the Third Circuit—which "has consistently held that it will not consider issues that are raised for the first time on appeal," *Harris* v. *City of Philadelphia*, 35 F.3d 840, 845 (3d Cir. 1994)—did not address it. *See also LIU* v. *Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("a passing reference to an issue * * * will not suffice to bring that issue before this court") (quotation omitted).

The thirteenth-hour nature of this argument is underscored by the extraordinary lengths to which respondent and her amici have gone in lodging with this Court, or referring to, materials outside the record in *this* case, treating the Court as if it were a trier of fact, rather than of the legal questions presented on certiorari. *See* Resp. Br. 39 n.27; U.S. Br. 19-20; Bowers Br. A1-A4; Trial Lawyers Br. 3 n.3. Such tactics have "consistently been condemned by th[is] Court." Robert L. Stern, *et al., Supreme Court Practice* 555 (7th ed. 1993) (citing cases).

NCAA.[13] Presumably, that explains why the Solicitor General—whose brief "reflects the joint views" of the agency that administers the NYSP grant, U.S. Br. 24 n.4—does not support respondent's direct recipient theory.[14]

The argument that the NCAA is an *indirect* recipient of the NYSP grant fares no better. *See* Resp. Br. 39-40; U.S. Br. 18-19. As we explained in our opening brief (pp. 15-17, 20-21 & n.11), and as the Solicitor General has underscored, "[t]his Court's decisions * * * draw a firm distinction between an entity that is an *intended recipient* that indirectly receives federal financial assistance

[13] For this reason, the Court should also reject respondent's passing suggestion that the NCAA is covered due to the NYSP grant pursuant to 20 U.S.C. § 1687. *See* Resp. Br. 39-41. As we explained in our opening brief (pp. 29-31), Section 1687 codified the principle of institution-wide coverage, under which an entity's entire operations are covered by Title IX if "any part of [the entity] is extended Federal financial assistance." 20 U.S.C. § 1687. Because it is a separate corporate entity, the NYSP is not "part" of the NCAA, *id.*; if Section 1687 somehow made it so, the provision would have codified far more than the principle of *institution*-wide coverage. Yet, when it enacted Section 1687, Congress made clear that it does "not change in any way who is a recipient," S. Rep. No. 100-64, at 28 (1987), and, thus, covered by Title IX in the first place.

[14] Nor is the NCAA subject to Title IX based on its interrelationship with the NYSP, as respondent's amici argue. *See* Trial Lawyers Br. 16-17. It is axiomatic that in all but the rarest case the corporate form will be respected, even when a plaintiff can show that it was "deliberately adopted * * * in order to secure its advantages." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946). *See New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 441 (1934). There is nothing in the record of this case—nor anything in the other materials cited by respondent's amici—to warrant disregarding the NYSP's corporate form; nor anything unusual about the fact that the NCAA interacts with it—as a separate corporate entity. In any event, as we explained in our opening brief (pp. 24-25), this Court has already repudiated the notion that entities may be covered by Title IX, "not because they had received federal financial assistance, but because they are 'inextricably intertwined' with an [entity] that has." *Paralyzed Veterans*, 477 U.S. at 610.

through an intermediary and an entity that merely benefits economically from federal funding. The former is subject to coverage, while the latter is not." U.S. Br. 11 (emphasis added). *Grove City*—and this Court's reading of that case in *Paralyzed Veterans*, 477 U.S. at 606-607—make clear that congressional intent is the touchstone of the indirect recipient determination. *See* 465 U.S. at 569, discussed at Pet. Br. 15-17. Thus, "only if *Congress* intended for petitioner to be a recipient of [the NYSP] grant[]" would the NCAA qualify as an indirect recipient. U.S. Br. 12 (emphasis added). Neither respondent nor her amici, however, offer any basis—and there is none—to conclude that the NCAA is the congressionally intended recipient of the grant to the separate NYSP.[15]

Respondent comes closest to defending the Third Circuit decision in arguing that the NCAA is "an indirect recipient of Federal assistance from its member institutions." Resp. Br. 41. Even here, though, she does not argue that the receipt of membership dues is enough to subject the NCAA to Title IX. Instead, she argues that the NCAA's receipt of "dues," along with the members' alleged assignment of authority to the NCAA over the "operation of their intercollegiate athletic programs," along with "the unique nature of intercollegiate athletics"—*together*—warrant "attribution of recipient status to the NCAA." *Id.* 41, 43, 44. For the reasons we have explained in Part II above and in our opening brief, none of these factors standing alone subjects the NCAA to Title IX. Amalgamating them does not either.

[15] Given the "firm distinction" that the Solicitor General acknowledges this Court has drawn between intended but indirect recipients and mere beneficiaries, U.S. Br. 11, it is astonishing—but nevertheless quite telling—that he asserts that the NCAA may be subject to Title IX on the basis of the grant to the NYSP, but then fails to cite any indication that Congress intended the NCAA to be the recipient of those funds. While they are not part of the record in this case, the letters to which the Solicitor General refers (pp. 19-20) also do not point to any indication that the NCAA is the intended recipient of the NYSP's funds, but instead merely categorically state that the NCAA receives funds "through" the NYSP. That is not true. But if it were, the NCAA also receives dues payments "through" its member schools, but—as we have explained and the Solicitor General agrees (Br. 12)—that does not subject it to Title IX.

More fundamentally, there is no basis for "attribut[ing] * * * recipient status to the NCAA" (Resp. Br. 44) merely because it plays an important role in intercollegiate athletics. The Solicitor General agrees. As he has explained, the NCAA may not be covered as "an indirect recipient of federal assistance" to its member schools, unless that is one of the "intended purposes of the assistance extended by Congress to [its] members." U.S. Br. 15. And neither respondent nor her amici has provided any indication—because there is none—that *Congress* intended the NCAA to be the indirect recipient of such assistance. *See* Pet. Br. 16-17.[16]

Respondent also argues that the NCAA "indirectly receives Federal assistance as described by the CRRA because it is an 'operation' of its federally-assisted member institutions." Resp. Br. 46 (quoting 20 U.S.C. § 1687). As we explained in our opening brief (pp. 30-32), and the Solicitor General echoes, the CRRA merely "establish[ed] coverage for all programs of a *recipient* institution. It 'does not change in any way who is a recipient of federal financial assistance,' or 'overrule or alter' this Court's holding in [*Paralyzed Veterans*]." U.S. Br. 15 (quoting S. Rep. No. 100-64, at 28-29; emphasis added).

[16] Nor does the NCAA fit within the regulatory definition of recipient as a "subunit, successor, assignee, or transferee" of member institutions. 34 C.F.R. § 106.2(h); *see* NWL Br. 9. These are established corporate terms that do not cover the relationship between the NCAA and its members, in which—pursuant to the NCAA constitution—members retain institutional control over intercollegiate athletics. *Se* Pet. Br. 23-24; *supra* at 9. Indeed, the example cited by respondent's amici involves the quite different situation where a recipient formally "subcontracts" work that is the subject of a federal grant. NWL Br. 9 n.17. That may explain why the Solicitor General does not join this argument and, instead, emphasizes that "operating" a federally assisted program does not subject a non-recipient to Title IX. U.S. Br. 13.

Thus, while the CRRA indisputably subjects "all of the operations of * * * a *college* [or] *university*"—including its athletics program—to Title IX, as long as "any part of [the institution] is extended Federal financial assistance," 20 U.S.C. § 1687(2)(A) (emphasis added), it does not sweep within Title IX's reach entities, such as the NCAA, that are not covered recipients in the first place. Otherwise, Section 1687 would extend Title IX to any entity involved with the operation of a federally assisted program—regardless of whether it is itself a recipient—in clear conflict with Congress' intent. *See* Pet. Br. 31-32.

Similarly, the NCAA is not swept within Title IX by Section 1687(4), as an entity established between two or more covered entities. *See* NWL Br. 19. As the structure of Section 1687 makes clear, the phrase "any part of which is extended Federal financial assistance" refers back to "all of the operations" of the entity in question. 20 U.S.C. § 1687. *See* U.S. Br. 15 (Section 1687 "establish[es] coverage for all programs of a *recipient* institution") (emphasis added). Section 1687(4) accordingly is of no avail to respondent unless she could show that the *NCAA itself* receives federal financial assistance, regardless of whether its members do. *See* S. Rep. No. 100-64, at 4 (under Section 1687(4) "the entire entity is covered if *it* receives any federal aid") (emphasis added); Pet. Br. 31. If she could, then "all of the [NCAA's] operations" would be covered, 20 U.S.C. § 1687, but, as we have explained, she cannot.[17] In any event, any reliance on Section 1687 to extend Title IX to the NCAA is suspect, since it is clear Congress did not intend that provi-

[17] This reading does not, as the NWL (Br. 20) suggests, render Section 1687(4) superfluous. Section 1687(4) ensures that an entity formed by two or more entities described in Section (1), (2), or (3) is covered in "all of [its] operations" if any part of *that entity* receives assistance; without Section 1687(4), such coverage would depend on how the entity was categorized under Sections 1687(1), (2), or (3). The Solicitor General (Br. 14, 21 n.3) recognizes that Section 1687(4) serves this role.

sion to expand coverage to entities—such as the NCAA—that were not recipients under preexisting law. That is presumably why the Solicitor General, for one, does not rely on Section 1687 in arguing on respondent's behalf.

IV. THE AMENDED COMPLAINT FAILS TO STATE A TITLE IX CLAIM AGAINST THE NCAA.

Finally, contrary to the suggestion of respondent (Resp. Br. 33-34) and the Solicitor General (U.S. Br. 17), the judgment below may not be affirmed solely on the basis of the amended complaint's allegation that: " 'The NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance.' " Pet. App. 18a (quoting Am. Compl.).[18] This is not a factual allegation at all, but a legal conclusion that simply parrots the Title IX regulation. *See* 34 C.F.R. § 106.2(h) ("recipient" includes an entity "to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance"). There are no *factual* allegations in the complaint which, if true, would support that conclusion as a matter of law, and certainly no allegations about the NYSP. In fact, the "bare allegation" (U.S. Br. 18) quoted above—the only one respondent and the Solicitor General can point to in the complaint—is scarcely more illuminating than the allegation that "the NCAA is covered by Title IX because it is."

Even under the notice pleading rules, this conclusory legal assertion is insufficient to state a Title IX claim

[18] The amended complaint does not allege that the NCAA is a *direct* recipient of federal funds, and, as we explain below, statements in an appellate brief cannot correct that. *See* Opp. Br. 7 n.2 (acknowledging that respondent would be required to "amend her complaint on remand * * * [to] allege that the NCAA is a direct recipient * * * as an alternative basis for holding that the NCAA is subject to Title IX").

against the NCAA. *See Campbell* v. *City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss") (quotation omitted); *Perkins* v. *Silverstein*, 939 F.2d 463, 467 (7th Cir. 1991) ("general statements of the law which were lifted verbatim from federal statutes, regulations and case law" fail to state claim).[19] Indeed, the "bare allegation" that the NCAA is an indirect recipient—unaccompanied by any supporting factual allegations that would render it such, if true—is no different than the conclusory allegation that diversity jurisdiction lies, without factual allegations as to the residence of the parties that, if true, would establish such jurisdiction.

While respondent is entitled to argue that the facts alleged in her amended complaint, if true, would state a claim against the NCAA under Title IX, she is limited to those facts and reasonable inferences drawn therefrom.

---

[19] *Accord Berner* v. *Delahanty*, 129 F.3d 20, 25 (1st Cir. 1997); *Palda* v. *General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995); *Clegg* v. *Cult Awareness Network*, 18 F.3d 752, 756 (9th Cir. 1994); *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216 n.28 (2d ed. 1990 & Supp. 1998) (collecting cases); 2A *Moore's Federal Practice* ¶ 12.07[2.-5], at 12-64 n.6 (2d ed. 1991) (same).

This Court's decision in *Conley* v. *Gibson*, 355 U.S. 41 (1957), cited by the Solicitor General (U.S. Br. 17), is not to the contrary. As one court of appeals recently put it, "[w]hile *Conley* permits a pleader to enjoy all favorable inferences from *facts* that have been pleaded, [it] does not permit conclusory statements to substitute for minimally sufficient factual allegations." *Electronics Communications Corp.* v. *Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243 (2d Cir. 1997) (emphasis added; quotation omitted). *See also Riddle* v. *Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996) (under *Conley* standard, "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based," even if the plaintiff is *pro se*) (quotation omitted); *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) (*Conley* "requires more than the bare assertion of legal conclusions").

She cannot save her complaint based on facts alleged in her (or her amici's) legal briefs. *See Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 526 (1983) ("As the case comes to us, we must assume that the [plaintiff] can prove the facts *alleged in its amended complaint*. It is not, however, proper to assume that the [plaintiff] can prove facts that it has not alleged.") (emphasis added); *City of Pittsburgh* v. *West Penn Power Co.*, 147 F.3d 256, 263 n.13 (3d Cir. 1998) (same); *see also Palda* v. *General Dynamics Corp.*, 47 F.3d at 875 ("we will not look beyond the four corners of the complaint itself to determine whether [plaintiff] can state a claim"). Indeed, even the Solicitor General agrees that "the sufficiency of [respondent's] amended complaint" should be "judged by the allegations in that complaint." U.S. Br. 18.[20]

For this reason, the courts below went *further* than they were required to in entertaining respondent's argument that the NCAA is subject to Title IX because it "receives dues from member institutions, which receive federal funds." Pet. App. 19a. As the Solicitor General points out, "[t]he only place in which respondent referred to dues was in her legal memorandum opposing petitioner's motion to dismiss her original complaint." U.S. Br. 18. But there is no reason for this Court to compound the error—and make new law on the standards for judging the sufficiency of a complaint—by considering the adequacy of other factual assertions that not only are outside the amended complaint, but were not properly raised or

---

[20] The First Circuit in *Gooley* v. *Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988), faced a situation similar to the one presented here, where the "plaintiff seem[ed] to have shifted his approach" in defending a claim on a motion to dismiss, raising new factual assertions "in his appellate brief—though nowhere in [his] amended complaint." The court of appeals rebuked this tactic, emphasizing that—"[m]odern notions of 'notice pleading' notwithstanding"—a plaintiff "is nonetheless required to set forth [adequate] factual allegations" in his complaint. *Id.*

passed upon below. Instead, the Court should follow its settled practice and deal with the case as it came here. The Court should answer the question on which it granted certiorari, set aside the erroneous Third Circuit judgment, and, if it deems it appropriate to do so, remand for further proceedings.

CONCLUSION

For the foregoing reasons, and those in petitioner's opening brief, the judgment of the Third Circuit below should be reversed.

Respectfully submitted,

ELSA KIRCHER COLE
General Counsel
NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION
6201 College Boulevard
Overland Park, KS 66211
(913) 339-1906

MARTIN MICHAELSON
JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5810

JOHN J. KITCHIN
ROBERT W. MCKINLEY
SWANSON, MIDGLEY, GANGWERE,
KITCHIN & MCLARNEY
922 Walnut Street
Suite 1500
Kansas City, MO 64106
(816) 842-6100

* Counsel of Record

Counsel for Petitioner

No. 98-84

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

R. M. SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

SETH P. WAXMAN
Solicitor General
Counsel of Record
BILL LANN LEE
Acting Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
DENNIS J. DIMSEY
MARIE K. MCELDERRY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

33pp

QUESTION PRESENTED

Whether respondent's amended complaint adequately alleged a basis for imposing liability on the National Collegiate Athletic Association for a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulations and rules:

Regulations and rules—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-84

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

R. M. SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States Department of Education extends financial assistance to educational programs and activities and is authorized by Congress to ensure compliance with Title IX, 20 U.S.C. 1682, in the operation of those programs and activities. Pursuant to that authority, the Department of Education has issued regulations enforcing Title IX, 34 C.F.R. Pt. 106, including regulations that define a recipient, 34 C.F.R. 106.2(h), and regulations that address the conduct of intercollegiate athletics, 34 C.F.R. 106.41. The United States Department of Health and Human Services (HHS) provides federal financial assistance to the National Youth Sports Program Fund, an entity that respondent has relied on as a basis for alleging that the National Collegiate Athletic Association (NCAA) receives federal financial assis-

tance. HHS has also issued a regulation defining a recipient that tracks the definition issued by the Department of Education. 45 C.F.R. 86.2(h). The United States Department of Justice coordinates the enforcement of Title IX by executive agencies. Exec. Order No. 12,250, 3 C.F.R. 298 (1981); 28 C.F.R. 0.51. The Department of Justice also has authority to enforce Title IX in federal court upon a referral by an agency that extends federal assistance to an education program or activity.

STATEMENT

1. Petitioner NCAA is an unincorporated association comprised of public and private colleges and universities, and "is responsible for promulgating rules governing all aspects of intercollegiate athletics, including recruiting, eligibility of student-athletes, and academic standards." Pet. App. 3a. The member institutions agree to abide by and enforce those rules. *Ibid.* One of petitioner's eligibility rules is NCAA Bylaw 14.1.8.2 (the Postbaccalaureate Bylaw), which prohibits student-athletes from participating in intercollegiate athletics at a postgraduate institution other than the one from which they received their undergraduate degree. *Id.* at 3a-4a.

In the fall of 1991, respondent Renee M. Smith enrolled in St. Bonaventure University and became a member of its Division I intercollegiate volleyball team. Pet. App. 3a. Respondent played intercollegiate volleyball at St. Bonaventure during the 1991-1992 and 1992-1993 seasons, but she elected not to play in the following year. *Ibid.*

Respondent graduated from St. Bonaventure in two-and-one-half years and enrolled in a post-graduate program at Hofstra University that was not offered at St. Bonaventure. Pet. App. 3a. Having used only two years of her eligibility, respondent sought to play on Hofstra's intercollegiate volleyball team during the 1994-1995 season. *Ibid.* Petitioner denied respondent eligibility to play based on its Postbaccalaureate Bylaw. *Ibid.* In 1995, respondent entered a post-graduate program at the University of Pittsburgh that was not offered at St. Bonaventure. *Ibid.* Respondent sought to play on Pittsburgh's intercollegiate volleyball team during the 1995-1996 athletic season, but petitioner again denied her eligibility to play based on the Postbaccalaureate Bylaw. *Ibid.* Respondent was in good academic standing and in compliance with all other NCAA eligibility requirements for the 1994-1995 and 1995-1996 athletic seasons. *Id.* at 4a.

Both Hofstra University and the University of Pittsburgh sought waivers from petitioner to allow respondent to participate in intercollegiate volleyball. Pet App. 4a. In each case, petitioner refused to waive its bylaw. *Ibid.*

2. a. In August 1996, respondent filed a pro se complaint against petitioner alleging, *inter alia*, that petitioner's refusal to waive its Postbaccalaureate Bylaw excluded her from participating in intercollegiate sports at Hofstra University and the University of Pittsburgh on the basis of her sex, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Pet. App. 4a. Title IX provides in relevant part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). Petitioner did not allege that the Postbaccalaureate Bylaw facially discriminates on the basis of sex. Instead, she alleged that petitioner had systematically granted waivers from its eligibility rules in a sexually discriminatory manner. Compl. 4.[1]

---

[1] Respondent also asserted a Sherman Act claim and a state contract law claim. Pet. App. 4a. The district court dismissed the Sherman Act claim for failure to state a claim upon which relief could be granted, and

Petitioner filed a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss respondent's Title IX claim on the ground that respondent had not alleged, and could not allege, that petitioner is a recipient of federal financial assistance. Mot. to Dis. 2. Although petitioner did not seek summary judgment, it attached an affidavit from its Executive Director for Financial and Business Services, which asserted that petitioner receives no federal financial assistance. Mot. to Dis., Exh. A, at 2. That affidavit also stated that the National Youth Sports Program Fund administers a federally funded program to provide underprivileged high school students with summer sports programs on college campuses, and that petitioner assists in administering that grant. *Ibid.* The affidavit denied that petitioner was a recipient of that grant. *Ibid.*

Respondent filed a brief in opposition to the motion to dismiss. In it, she argued that petitioner is covered by Title IX because (1) petitioner "enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity," (2) petitioner "benefits greatly when students receive federal financial aid," since "student-athletes might not otherwise be financially able to participate in athletic programs," and (3) "although the income may not go directly back to [petitioner], the funding may ultimately be paid from the member institution[s] to [petitioner] in membership dues or other fees." Br. in Opp. to Mot. to Dis. 6.

The district court dismissed respondent's Title IX claim, Pet. App. 29a-33a, on the ground that respondent had failed to allege in her complaint that petitioner is a recipient of federal financial assistance, *id.* at 31a. The court further

---

exercised its discretion to dismiss the state contract claim under 28 U.S.C. 1367. Pet. App. 5a. The court of appeals affirmed the dismissal of the Sherman Act claim, *id.* at 5a-12a, and this Court denied certiorari, No. 98-107. Only respondent's Title IX claim is at issue here.

concluded that the "'connections' with federal funding listed in Plaintiff's Opposition Brief * * * are too far attenuated to qualify Defendant NCAA as a recipient of federal funds." *Id.* at 31a-32a.

b. Respondent sought leave to file an amended complaint to add new allegations and to add Hofstra University and the University of Pittsburgh as parties. Mot. to Amend Compl. The amended complaint alleged that "[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." Amended Compl. 7. The amended complaint also alleged that Hofstra University and the University of Pittsburgh are recipients of federal funds. *Ibid.* Finally, the amended complaint alleged that petitioner violated Title IX by discriminating on the basis of sex in denying her a waiver to participate in an activity receiving federal funds, and that Hofstra University and the University of Pittsburgh violated Title IX by enforcing petitioner's decision to deny eligibility. *Ibid.*

Petitioner opposed the motion to amend on the ground that respondent's new allegations were simply a different way of asserting what she had already asserted in her brief opposing the dismissal of her complaint. Suggestions in Opp. to Mot. to Amend Compl. 4. The district court denied respondent's motion to amend her complaint "as moot, the court having granted defendant's motion to dismiss on May 20, 1997." Pet. App. 35a-36a.

3. The court of appeals reversed the district court's denial of respondent's motion for leave to amend her complaint. Pet. App. 1a-20a. The court held that respondent's motion was not "moot" because a district court has discretion to grant leave to amend even after it has dismissed a complaint. *Id.* at 17a-18a. The court of appeals also held that, while a motion for leave to amend may be denied based on

the ground of futility, the district court could not have justifiably denied respondent's proposed amendment on that basis. *Id.* at 18a-19a. The court of appeals reasoned that respondent's allegation that "[petitioner] receives dues from member institutions, which receive federal funds * * * would be sufficient to bring [petitioner] within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss." *Id.* at 19a.

In reaching that conclusion, the court of appeals noted that, in *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597, 606-607 (1986), this Court "drew a distinction between those entities which indirectly *benefit from* federal assistance and those that indirectly *receive* federal assistance, holding that only those [that] *receive* federal funds are within the statute." Pet. App. 15a. The court of appeals, however, declined to "apply the *Paralyzed Veterans* Court's definition of 'recipient.'" *Ibid.* The court of appeals understood a Title IX regulation issued by the Department of Education to define "recipient" to include an entity that "'operates an educational program or activity which *receives* or *benefits*' from federal funds," *ibid.* (quoting 34 C.F.R. 106.2(h)), and it concluded that "[a]pplication of *Paralyzed Veterans* here would render the regulatory definition of 'recipient' under Title IX a nullity." Pet. App. 15a-16a. The court of appeals also concluded that petitioner is "not merely an incidental beneficiary of federal funds," *id.* at 16a, since it "essentially acts as a 'surrogate'" of its members "with respect to athletic rules," *id.* at 14a.[2]

[2] In her appellate brief, respondent asserted that the grant of federal funds to the National Youth Sports Program also made petitioner a recipient of federal funds. C.A. Br. 5, 22. The court of appeals did not address that argument.

SUMMARY OF ARGUMENT

The court of appeals' holding that petitioner is a recipient of federal assistance is based on the application of an incorrect legal standard. Because respondent's proposed amended complaint states a claim for relief against petitioner, however, the court of appeals' judgment permitting respondent to file her amended complaint should be affirmed.

A. This Court's decisions in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), and *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), establish the standards for determining whether an entity is a recipient of federal financial assistance. Entities that indirectly receive federal assistance through an intermediary are recipients, while entities that only benefit economically from federal assistance are not. In holding that petitioner's receipt of dues from members makes petitioner a recipient, however, the court of appeals declined to apply that analysis. The court understood a regulation issued by the Department of Education to define a recipient to include an entity that operates an educational program that receives *or* benefits from federal funds, and it concluded that applying this Court's definition of recipient would render that regulation a nullity.

The court of appeals misinterpreted the regulation. The regulation mandates the same inquiry that is required by this Court's decisions. Because the court of appeals never undertook that inquiry, its holding that petitioner's receipt of dues makes it a recipient is tainted by legal error.

B. The court of appeals' judgment should nonetheless be affirmed because respondent's amended complaint states a claim for relief against petitioner. In particular, respondent not only alleged that petitioner excluded her from an education program on the basis of sex, but also that petitioner

"receives federal financial assistance through another recipient." Those allegations, if proven, would establish that petitioner is a recipient of federal assistance under this Court's decisions and that petitioner violated respondent's rights under Title IX. Since the allegations in the amended complaint state a claim for relief, the district court abused its discretion in denying respondent leave to file her amended complaint.

That conclusion is particularly warranted in the circumstances presented here because respondent's amended complaint encompasses a claim that petitioner receives federal assistance indirectly through a grant made by HHS to the National Youth Sports Program Fund, an entity created by petitioner. That grant has led two courts to find an issue of fact as to petitioner's status as a recipient, and HHS has issued two letters finding that petitioner is a recipient based on that grant. Those judicial and administrative determinations reinforce the conclusion that respondent should be given an opportunity to prove the allegation in her amended complaint that petitioner receives federal assistance through another recipient.

C. The court of appeals' judgment should be affirmed on another ground as well. Petitioner's amended complaint sought to add Hofstra University and the University of Pittsburgh as parties, alleged that they are recipients of federal assistance, and alleged that petitioner acted to exclude her on the basis of sex from participating in intercollegiate athletics at those assisted colleges. Those allegations are sufficient to state a claim for relief, regardless of whether petitioner is itself a recipient.

The text of Title IX is most naturally read as extending its prohibition on sex-based discrimination in federally assisted programs not only to recipients but also to any other entity to which a recipient has ceded controlling authority over a program. While recipients are the principal class of entities

that may not subject an individual to discrimination under a federally assisted program, they are not the only ones. When a recipient cedes controlling authority over a program receiving assistance to another entity, and that entity subjects an individual to discrimination under the program, the entity ceded authority violates Title IX. That is what respondent alleges happened here.

Permitting a private right of action in such circumstances furthers Title IX's central purposes of avoiding the use of federal resources to support discriminatory practices and of providing individual citizens with effective protection against those practices. Because petitioner has been ceded effective control over eligibility determinations at member schools, and is in the best position to know whether those determinations are infected with discrimination, it should not escape liability if the eligibility determinations reflect a pattern of discrimination. Moreover, if only member schools could be liable, it would mean that, when a member detects discrimination and is unable to persuade petitioner to change or waive its rules, its only option would be to withdraw from the NCAA. That would leave victims of discrimination without an effective remedy and deprive innocent third parties of intercollegiate athletic opportunities as well. Permitting a remedy against petitioner avoids those harsh consequences and also provides a mechanism for stopping discrimination at its source before it becomes entrenched at member schools.

The application of Title IX in the circumstances presented here does not raise any notice issue since the premise of respondent's suit is that petitioner is responsible for its own intentional discrimination. And no constitutional issue is raised because Congress has authority to reach the conduct of anyone who threatens "the integrity and proper operation of [a] federal program." *Salinas* v. *United States*, 118 S. Ct. 469, 475 (1997).

Finally, the right of action that respondent seeks to enforce is not affected by *Paralyzed Veterans*. That case holds only that coverage does not extend past recipients to beneficiaries. The Court did not purport to address the entirely different question whether an entity that has been ceded controlling authority over a program receiving federal assistance violates Title IX when it subjects an individual to discrimination under that program.

ARGUMENT

RESPONDENT'S AMENDED COMPLAINT STATES A CLAIM FOR RELIEF UNDER TITLE IX

A. The Court Of Appeals' Holding That Petitioner Is A Recipient Is Tainted By Legal Error

The court of appeals held that petitioner's receipt of dues from member institutions of higher education that receive federal funds is sufficient to establish that petitioner is a recipient of federal funds. Pet. App. 16a. That holding is based on the application of an incorrect legal standard.

1. This Court has twice addressed the question of when an entity may be treated as a recipient of federal financial assistance. In *Grove City College* v. *Bell*, 465 U.S. 555, 563-569 (1984), the Court held that an institution of higher education is a recipient of federal funds subject to coverage under Title IX when it enrolls students who receive federal student aid grants that must be used for educational purposes. The Court explained that the text of Title IX draws no distinction between aid that is received directly from the federal government and aid that is received indirectly through students or other intermediaries. *Id.* at 564 & n.12. The Court also stressed that one of the express purposes of the student aid grant program was to provide federal assistance to institutions of higher education. *Id.* at 566.

In *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), the Court

addressed the scope of coverage under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination on the basis of disability under federally funded programs in substantially the same terms that Title IX uses to prohibit discrimination on the basis of sex. The Court held that airlines are not recipients of federal funds that are received directly by airports for use in airport construction projects. The Court rejected the contention that airlines can be viewed as recipients because many of the projects constructed with federal funds are especially beneficial to them. 477 U.S. at 606-607. The Court reasoned that the text of Section 504 "covers those who receive the aid, but does not extend as far as those who benefit from it." *Id.* at 607. The Court also emphasized that tying the scope of Section 504 to those who benefit economically from federal assistance would result in almost "limitless coverage." *Id.* at 608.

The Court also rejected the contention that airlines are recipients under the reasoning of *Grove City*. The Court stated that, "[w]hile *Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid." 477 U.S. at 607.

This Court's decisions therefore draw a firm distinction between an entity that is an intended recipient that indirectly receives federal financial assistance through an intermediary and an entity that merely benefits economically from federal funding. The former is subject to coverage, while the latter is not. See also *Grzan* v. *Charter Hosp. of N.W. Ind.*, 104 F.3d 116, 119-120 (7th Cir. 1997) (employees who receive wages from a direct recipient of federal assistance are beneficiaries of the assistance, not indirect recipients); *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782,

785-788 (6th Cir. 1996) (railroads are indirect recipients of funds appropriated for use in improving railway-highway crossings where funds are allocated to States, the States distribute the funds to railroads to make the improvements, and the railroads then own the improvements).

2. Under *Grove City* and *Paralyzed Veterans*, petitioner's receipt of dues from its members that receive federal funding could constitute federal financial assistance to petitioner only if Congress intended for petitioner to be a recipient of one of the grants provided to member schools. See 34 C.F.R. Pt. 100, App. A (listing grants to institutions of higher education). That does not mean that petitioner would have to be identified in a particular grant statute as an intended recipient. It does mean, however, that petitioner must be among the class of entities that the particular grant is intended to reach. See, *e.g.*, 34 C.F.R. 106.2(h) (providing that the term "recipient" includes any "subunit, successor, assignee, or transferee" of a recipient). If petitioner merely benefits from a grant to member schools, the dues petitioner receives from members would not represent federal financial assistance to petitioner.

For example, the extension of federal funding to an institution of higher education for one program or activity may free up an institution's money for use elsewhere and thereby facilitate the payment of dues to petitioner. That would make petitioner a beneficiary of the federal assistance that its member institutions receive. As this Court made clear in *Paralyzed Veterans* and *Grove City*, however, that kind of economic ripple effect is not a sufficient basis for concluding that petitioner is a recipient of federal funds. *Paralyzed Veterans*, 477 U.S. at 607-608; *Grove City*, 465 U.S. at 572-573.

3. In holding that petitioner's receipt of dues makes it a recipient, the court of appeals declined to "apply the *Paralyzed Veterans* Court's definition of 'recipient.'" Pet. App.

15. The court understood a Title IX regulation issued by the Department of Education to define "recipient" to include an entity that "'operates an educational program or activity which *receives* or *benefits*' from federal funds," *ibid.* (quoting 34 C.F.R. 106.2(h)), and it concluded that "[a]pplication of *Paralyzed Veterans* here would render the regulatory definition of 'recipient' under Title IX a nullity." Pet. App. 15a-16a.

The court of appeals, however, misinterpreted the Department of Education's regulation. That misinterpretation stems from the court's omission of crucial language from its description of the regulation. The regulation provides in relevant part that a "recipient" includes any entity "*to whom Federal financial assistance is extended directly or through another recipient and* which operates an education program or activity which receives or benefits from such assistance." 34 C.F.R. 106.2(h) (emphasis added). As the phrase omitted by the court of appeals makes clear, operating an education program that benefits from federal assistance is not sufficient by itself to make an entity a recipient. To qualify as a recipient, an entity must also be one "to whom Federal financial assistance is extended directly or through another recipient." Consistent with *Paralyzed Veterans* and *Grove City*, the Department of Education interprets that latter requirement to mean that entities that indirectly receive federal assistance through an intermediary are recipients, but that entities that merely benefit from federal assistance are not.

The regulation, promulgated in 1975, defined a "recipient" of federal assistance as an entity which receives federal assistance, and operates a program which itself "receives *or benefits from* such assistance." The purpose of including "benefits" as well as "receives" was to provide coverage of virtually all programs of an entity receiving assistance, and to avoid the necessity of tracing funds through an institution

to a particular program. That language did not, however, eliminate the separate requirement in the regulation that, in order to qualify as a recipient, an entity must receive federal assistance and not merely benefit from it. The court of appeals therefore erred in relying on that language to support its conclusion that the regulation adopts a more expansive definition of recipient than that set forth in *Paralyzed Veterans*.

In any event, as the result of events subsequent to the promulgation of the regulation, the Department of Education no longer finds it necessary to rely on the "benefits" language for coverage of a program that benefits from federal funds but does not receive them. First, in *Grove City*, the Court rejected that approach to coverage as "inconsistent with the program-specific nature of" Title IX. 465 U.S. at 572. The Court held that Title IX does not necessarily cover all the operations of a recipient. Instead, the Court held that coverage is limited to the particular programs receiving assistance, and the relevant "program" receiving assistance is defined in terms of the particular grant statute at issue. *Id.* at 571-574.

Second, in response to *Grove City*, Congress enacted the Civil Rights Restoration Act of 1987 (Restoration Act), 20 U.S.C. 1687 *et seq.*, which reversed the part of *Grove City* that limited Title IX's coverage to the specific "programs" receiving assistance. The new statute defines "program or activity" as "all of the operations of * * * a college, university, or other postsecondary institution, or a public system of higher education * * * any part of which is extended Federal financial assistance." 20 U.S.C. 1687(2)(A). The Restoration Act establishes a similar form of institution-wide coverage for entities that are principally engaged in the business of providing certain public services, and for institutions that are created by two or more covered entities. 20 U.S.C. 1687(3)(A)(ii) and (4). The definition of "program" in

the Restoration Act supersedes the definition of "program" adopted in *Grove City*, establishing coverage for all programs of a recipient institution. It "does not change in any way who is a recipient of federal financial assistance," S. Rep. No. 64, 100th Cong., 1st Sess. 28 (1987), or "overrule or alter" this Court's holding in *[Paralyzed Veterans]*," *id.* at 29.

In view of those developments, the Department of Education now relies on the Restoration Act, rather than the "benefits" language, to define the programs as to which recipients have Title IX obligations. For that reason as well, the court of appeals erred in relying on that language as support for its conclusion that petitioner's receipt of dues makes it a recipient.

4. In holding that petitioner's receipt of dues is sufficient to make it a recipient of federal assistance, the court of appeals also relied on petitioner's unique relationship with its member schools. Pet. App. 16a. The court noted that petitioner essentially acts as a surrogate for its members in establishing rules for intercollegiate athletics, while the airlines in *Paralyzed Veterans* had no authority with respect to the operation of the airports' construction projects. *Id.* at 14a, 16a.

Petitioner's role in governing intercollegiate athletics at member schools may be relevant to the inquiry that must be made in deciding whether petitioner is an indirect recipient of federal assistance by virtue of the dues that it receives from member schools, but it does not fully answer that inquiry. That inquiry must examine not only petitioner's role, but also the intended purposes of the assistance extended by Congress to petitioner's members. Because the court of appeals never made the inquiry required by *Grove City* and *Paralyzed Veterans*, its holding that petitioner's receipt of dues makes it a recipient of federal assistance is tainted by legal error.

B. Respondent's Proposed Amended Complaint Adequately Alleged That Petitioner Is A Recipient

Although the court of appeals committed legal error in its assessment of the significance of petitioner's receipt of dues, its judgment permitting respondent to amend her complaint should nonetheless be affirmed. Since respondent's amended complaint adequately alleged that petitioner is a recipient, the district court abused its discretion in refusing to permit respondent to amend her complaint.

1. The district court denied respondent's motion to amend her complaint on the ground that the dismissal of respondent's complaint made the motion "moot." Pet. App. 36a. That explanation is facially inadequate. Even after a complaint is dismissed, a district court has authority to grant leave to amend a complaint. Indeed, Federal Rule of Civil Procedure 15(a) instructs that such leave "shall be freely given." A district court may deny leave to amend where the proposed amendment would be futile—*i.e.*, where the amendment would not survive a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). Leave to amend may also be denied on such grounds as "undue delay, bad faith or dilatory motive[,] repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party." *Ibid.* A district court does not have discretion, however, to simply deny such a motion on the ground that a previous dismissal of the action renders the motion moot.

2. The district court's action also cannot be justified on the theory that granting respondent leave to amend would have been futile. The standards for resolving that issue are the same that apply when deciding whether a complaint may be dismissed for failure to state a claim. 3 J.W. Moore, *Moore's Federal Practice* ¶ 15.08[4], at 15-81 (D.R. Coquillette et al. eds., 2d ed. 1996). Respondent's allegations in her amended complaint therefore must be accepted as true, and leave to amend may be denied only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). Moreover, since respondent was proceeding pro se in the district court, her allegations must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (per curiam).

Judged by those standards, respondent's amended complaint stated a claim for relief against petitioner under Title IX. In particular, respondent alleged not only that petitioner excluded her from an education program on the basis of her sex, but also that petitioner "receives federal financial assistance through another recipient." Amended Compl. 7. Those allegations, if proven, would establish that petitioner is a recipient of federal assistance under this Court's decisions in *Paralyzed Veterans* and *Grove City*, and that petitioner violated respondent's rights under Title IX.

Nor does it matter that the amended complaint does not contain any details concerning how respondent proposes to prove that petitioner receives funding through another recipient. With exceptions not relevant here, the Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957). Instead, they require only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Respondent's allegation that petitioner receives federal assistance through another recipient is sufficient to satisfy that standard.

3. Petitioner seeks to justify the district court's action on the theory that the allegation in the amended complaint that petitioner receives federal assistance through another fed-

eral recipient simply refers to petitioner's receipt of dues. Pet. Br. 7. But there is no reference to dues in respondent's amended complaint, nor does her brief in support of her motion for leave to file an amended complaint refer to dues. The only place in which respondent referred to dues was in her legal memorandum opposing petitioner's motion to dismiss her original complaint. Respondent was entitled to have the sufficiency of her amended complaint judged by the allegations in that complaint, not by a legal memorandum explaining one basis for a previous complaint. *Hishon*, 467 U.S. at 73; see also *Bartholet* v. *Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992); *Car Carriers, Inc.* v. *Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985). Since the amended complaint sufficiently alleged that petitioner is a recipient of federal funds, the district court abused its discretion in failing to grant respondent leave to file that amended complaint.

4. That conclusion is particularly warranted in the circumstances presented here, because the record contains more than the bare allegation in the proposed amended complaint. Respondent's allegation that petitioner receives federal assistance through another recipient encompasses a claim that petitioner receives federal assistance indirectly by virtue of a grant made by HHS to the National Youth Sports Program Fund (Fund), an entity created by petitioner. In the district court, the HHS grant was put in issue by petitioner's affidavit denying that it would support a finding that petitioner is a recipient, and in the court of appeals respondent argued that the grant supports the claim in her complaint that petitioner receives federal funds through another recipient.

Moreover, this precise grant has led two district courts to find an issue of fact as to petitioner's status as a recipient of federal assistance, and to deny motions for summary judgment filed by petitioner on that issue. In *Bowers* v. *National*

Collegiate Athletic Ass'n, 9 F. Supp. 2d 460, 492-494 (D.N.J. 1998), a case in which plaintiff alleged that petitioner discriminated on the basis of disability in violation of Section 504 of the Rehabilitation Act, the district court concluded that "there are genuine questions of material fact as to whether the NCAA receives federal funds through the [Fund] or whether the NCAA is intertwined with the [Fund] such that it cannot be considered separate." *Id.* at 494. The court specifically cited evidence that: (1) an NCAA committee administers the National Youth Sports Program; (2) the powers of the Fund are limited by the Council of the NCAA; (3) the Executive Director of the NCAA and the Chair of the NCAA committee sit on the Board of the Fund; (4) all members of that Board are employees of the NCAA or the NCAA committee; (5) the Fund must report annually to the NCAA Council; (6) upon dissolution of the Fund, its assets are to be distributed to the NCAA; and (7) the NCAA's Executive Director referred to the Fund as one of the NCAA's best kept secrets. *Ibid.*

In *Cureton* v. *National Collegiate Athletic Ass'n*, No. Civ. A. 97-131, 1997 WL 634376, at * 2 (E.D. Pa. Oct. 9, 1997), a case in which plaintiff alleged that petitioner had discriminated on the basis of race in violation of Title VI, the district court held that "[i]f the National Youth Sports Program fund is nothing more than a sham to disguise the NCAA's use of federal funds for its own benefit, then the NCAA does receive federal financial assistance." The court concluded that "[t]his determination can neither be made nor refuted based upon the present record before the court." *Ibid.*

The Office of Civil Rights of HHS has also issued two letters finding that petitioner is a recipient of federal assistance by virtue of the grant to the Fund. The letters state that "[t]he NCAA * * * is a recipient of Federal financial assistance through a Community Services Block Grant from this Department." Letter from John W.

Halverson, Regional Manager, Office for Civil Rights, to Frank R. Soda 1 (Nov. 8, 1994); see also Letter from John W. Halverson, Regional Manager, Office for Civil Rights, to Frank R. Soda 1 (Mar. 10, 1998).

Those judicial and administrative determinations reinforce the conclusion that respondent's motion to amend her complaint should not have been denied as futile. Respondent should be given an opportunity to prove the allegation in her amended complaint that petitioner receives federal assistance through another recipient.

C. Respondent's Amended Complaint Adequately Alleged A Violation Of Title IX Even If Petitioner Is Not A Recipient

Respondent's amended complaint also added allegations that would make petitioner liable to respondent whether or not petitioner itself is a recipient of federal assistance. In addition to alleging that petitioner is a recipient, respondent's amended complaint sought to add Hofstra University and the University of Pittsburgh as defendants, alleged that they are recipients of federal assistance, and alleged that petitioner acted with them to exclude her on the basis of sex from participating in intercollegiate athletics at those federally assisted colleges. Amended Compl. 7. Those allegations are sufficient to state a claim for relief under Title IX, regardless of whether petitioner is itself a recipient. The court of appeals' judgment permitting respondent to amend her complaint should be affirmed for that reason as well.

1. The text of Title IX firmly supports the conclusion that petitioner's liability does not depend solely on whether it is a recipient. Title IX provides in relevant part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). As that statutory text makes clear, Title IX was not

drafted "simply as a ban on discriminatory conduct by recipients of federal funds." *Cannon* v. *University of Chicago*, 441 U.S. 677, 691-692 (1979). Instead, the "unmistakable focus" of the statutory text is on the protection of "the benefited class." *Id.* at 691. The text itself does not specifically identify the class of potential violators. But given the focus of the text on protection for the individual, and the absence of any language limiting the class of violators to recipients, Title IX is most naturally read as extending its prohibition on sex-based discrimination in federally assisted programs not only to recipients but also to any other entity to which a recipient has ceded controlling authority over a program.

Recipients are the principal class of entities that may not subject an individual to discrimination under a federally assisted program. They are not, however, the only ones. When a recipient cedes controlling authority over a program receiving assistance to another entity, and that entity subjects an individual to discrimination under the program, that entity violates Title IX, regardless of whether it is a recipient itself. Respondent's allegation that petitioner has used its controlling authority over intercollegiate athletics at Hofstra University and the University of Pittsburgh to subject her to gender-based discrimination under those federally assisted programs therefore states a claim for relief under Title IX.[3]

---

[3] There is an important difference between the scope of petitioner's obligation as a controlling authority and the scope of its obligations if it is found to be a recipient itself. If petitioner is a recipient, all of its operations are covered by Title IX. See 20 U.S.C. 1687(3)(A)(ii) (establishing institution-wide coverage for entities that principally provide educational services); 20 U.S.C. 1687(4) (establishing institution-wide coverage for institutions created by two or more covered entities). If petitioner is not a recipient, it is covered by Title IX only to the extent that it exercises controlling authority over the intercollegiate athletic programs at member schools.

2. That commonsense reading of Title IX furthers its central purposes—"to avoid the use of federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. Several considerations support that conclusion.

First, petitioner not only has the power to establish the rules governing eligibility for intercollegiate athletics at member schools, it also administers those rules by making individual eligibility and waiver determinations for its member schools. Member schools have an obligation to implement the decisions made by petitioner; they do not make the rules or the determinations themselves. Because petitioner has been ceded effective control over eligibility determinations for intercollegiate athletics, it is the entity most responsible for any discrimination that enters into those determinations.

Second, while petitioner reviews waiver requests from all member schools, each individual school has experience with only a limited number of those requests. Petitioner is therefore in a far better position than member schools to determine whether its rules are being applied in a discriminatory manner. Indeed, because of the limited information available to member schools, they could implement discriminatory decisions by petitioner without even being aware of it. Since petitioner is the party with the most access to information about whether eligibility determinations are infected with discrimination, and indeed the party whose pattern of decision-making is challenged by the claim of discrimination, petitioner should not escape liability if the eligibility determinations reflect a pattern of discrimination.

Third, if a member detects discrimination in petitioner's rules, and is unable to persuade petitioner to change or waive them, its only option is to withdraw from the NCAA. Since petitioner has a virtual monopoly on intercollegiate

athletics, a school that has withdrawn from the NCAA in order to satisfy its own Title IX obligations could no longer offer intercollegiate athletic opportunities to its students. That would leave victims of discrimination without an effective remedy and deprive innocent third parties of intercollegiate athletic opportunities as well. Those harsh consequences may be avoided if victims of petitioner's discrimination may seek relief against petitioner directly.

Finally, because of its unique power over intercollegiate athletics, discrimination by petitioner in the administration of its rules has the capacity to result in discrimination at numerous member schools simultaneously. Permitting a private right of action against petitioner provides a mechanism for stopping discrimination at its source before it becomes entrenched at member schools.

We do not suggest that only petitioner may be sued for discrimination that it causes at member schools. A member school remains liable for any discriminatory decision of petitioner's that it implements. See 34 C.F.R. 106.6(c) (recipient's duty to comply with Title IX is not "obviated or alleviated by any rule or regulation of any * * * athletic or other league"). For the reasons discussed above, however, if petitioner is the source of the discrimination and uses its power over member schools to implement that discrimination, a remedy against petitioner is more appropriate and efficacious than a remedy against member schools.

3. The conclusion that non-recipients can, in some circumstances, be targets of a private right of action is also consistent with the rest of the statutory scheme. Title IX contains a prohibition on discrimination in 20 U.S.C. 1681, and two express mechanisms for administrative enforcement of that prohibition—the fund-termination remedy set forth in 20 U.S.C. 1682(1), and enforcement "by any other means authorized by law" set forth in 20 U.S.C. 1682(2). The private right of action has been derived from 20 U.S.C. 1681.

Only the fund-termination remedy of Section 1682(1) contains a limitation to recipients of federal assistance; no such limitation appears in the basic prohibition, the derivative private right of action, or the "any other means" enforcement mechanism of Section 1682(2). The logical inference is that Title IX's most drastic sanction is reserved for recipients of federal assistance, but that Title IX's other enforcement mechanisms may be invoked against any entity with controlling authority over a program that subjects individuals to discrimination under that program. Such entities include not only recipients but also entities that have been ceded controlling authority over a program by a recipient.[4]

In addition, this Court has previously recognized that the private right of action and administrative fund cut-off are complementary remedies, and that the private right of action may often provide an effective and appropriate remedy in situations where a fund cut-off would not. *Cannon*, 441 U.S. at 704-706. For example, the Court has noted that one gap in enforcement filled by the private right of action is the isolated and nonsystematic case of discrimination, which is not well suited for fund cut-off, *ibid.*, and which may present a case where the only possible benefit to the victim of discrimination consists of damages, *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992). A similar gap in enforcement exists here. A private right of action against a non-recipient that has been ceded controlling authority over a program helps to fill a gap in Title IX enforcement that

[4] The regulations issued by the Department of Education impose obligations only on recipients. 34 C.F.R. Pt. 106. The regulations do not address whether Title IX imposes an obligation on other entities when they exercise authority over a program receiving assistance. With respect to that issue, this brief reflects the joint views of the Department of Education, the Department of Health and Human Services, and the Department of Justice.

would be left if Title IX's enforcement scheme were limited to the fund-termination remedy.

4. Permitting a private right of action against petitioner is also consistent with the principle that entities should not be subjected to liability under Title IX without adequate notice. See *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1997-1999 (1998). Respondent does not seek to hold petitioner liable for discrimination committed by others; rather, respondent seeks to hold petitioner liable for its own alleged discrimination in the administration of its rules. The text of Title IX provides sufficient notice to petitioner that it had an obligation not to use its authority over an education program receiving federal assistance to subject an individual to intentional sex-based discrimination under that program. See *Franklin*, 503 U.S. at 74-75 (A "notice problem does not arise in a case such as this, in which intentional discrimination is alleged."); see also *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) (federal funding statute need not "prospectively resolve every possible ambiguity concerning particular applications").

If petitioner did not wish to subject itself to Title IX obligations on the basis of its relationship to member institutions that receive assistance, it could have refrained from exercising controlling authority over intercollegiate athletics at those institutions. Once petitioner assumed that controlling role, it also assumed an obligation not to use its controlling authority to discriminate on the basis of sex against individuals seeking access to intercollegiate athletic programs at those institutions.

5. Petitioner contends (Br. 26) that it cannot be liable because it did not enter into a contract with a federal funding agency in which it promised not to discriminate. The text of Title IX, however, is not framed exclusively in contract terms, and a contractual commitment not to discriminate is not a precondition to application of the statute.

If a contract analogy were needed, the relevant one would be to the tort of intentional interference with a contract. Restatement (Second) of Torts § 766 (1979) (one who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract is subject to liability to the other). When an entity which has been ceded controlling authority over a recipient requires the recipient to act in a discriminatory manner, it effectively causes the recipient to breach its agreement with the federal funding agency. Moreover, when an entity created by recipients makes and enforces rules for recipients, it is on ample notice that it cannot do so in a way that subjects an individual to discrimination under the programs of the recipients.

6. Because petitioner received adequate notice of Title IX's obligations, petitioner's contention (Br. 18) that "[l]ack of notice is a basic constitutional impediment" to applying Title IX to its alleged conduct is without merit. Nor is there any other basis for challenging the constitutionality of Title IX as applied to petitioner's alleged conduct. Congress has constitutional authority to reach the conduct of anyone who threatens "the integrity and proper operation of [a] federal program." See *Salinas* v. *United States*, 118 S. Ct. 469, 475 (1997) (upholding constitutionality of a statute that prohibits the acceptance of bribes by employees of state and local agencies that receive federal funds as applied to a case in which a county received funds for the operation of a jail and the sheriff and deputy sheriff at the jail accepted bribes in violation of the statute). Since petitioner's actions, if discriminatory, pose a threat to the integrity and proper operation of the federally assisted programs at member schools, Congress had constitutional authority to subject petitioner to liability for such discrimination.

7. Finally, subjecting non-recipients that have been ceded controlling authority over federally assisted programs to coverage under Title IX is not in conflict with this Court's decision in *Paralyzed Veterans*. There are statements in that opinion that support petitioner's argument that federal funding statutes like Title IX apply only to recipients of federal financial assistance. 477 U.S. at 605-606. The context of those statements makes clear, however, that the Court was addressing only whether coverage should extend past recipients to beneficiaries. The Court did not purport to address the entirely different question whether an entity that has been ceded controlling authority over a program receiving federal assistance violates Title IX when it subjects an individual to discrimination under that program. Indeed, the Court took pains to explain that "[t]he only issue before us is the Court of Appeals' conclusion that § 504 applies to commercial airlines *as recipients* of federal financial assistance." *Id.* at 604 (emphasis added). Because the airlines did not have controlling authority over the federally assisted airport programs, the question at issue here simply was not presented in *Paralyzed Veterans*.

Equally important, the Court's crucial concern in *Paralyzed Veterans* was that expanding the funding statutes to reach beneficiaries of federal assistance would have resulted in "almost limitless coverage"—a result that was clearly at odds with Congress's intent. 477 U.S. at 608-609. The situation here is fundamentally different. The class of non-recipients that has been ceded controlling authority over programs receiving assistance is limited, and permitting a private right of action against such entities when they subject persons to discrimination under those programs advances the purposes of Title IX.[5]

---

[5] This case does not present the question whether Title IX creates a private right of action against an individual who acts in derogation of

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
BILL LANN LEE
Acting Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
DENNIS J. DIMSEY
MARIE K. MCELDERRY
Attorneys

DECEMBER 1998

---

policies established by a recipient or another entity with controlling authority over a program. Such individual-capacity suits raise very different considerations from those implicated here.

No. 98-84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R.M. SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF NATIONAL WOMEN'S LAW CENTER AMERICAN ASSOCIATION OF UNIVERSITY WOMEN AMERICAN CIVIL LIBERTIES UNION, *et al.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

(Additional *Amici* Listed on Inside Cover)

LOIS G. WILLIAMS
BRAD E. BIEGON
HOWREY & SIMON
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004

DINA R. LASSOW
LOBEL, NOVINS & LAMONT
1275 K Street, N.W., Suite 770
Washington, D.C. 20005

MARCIA D. GREENBERGER*
* *Counsel of Record*
LESLIE T. ANNEXSTEIN
NEENA K. CHAUDHRY
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W., Suite 800
Washington, D.C. 20036
(202) 588-5180

DEBORAH L. BRAKE
UNIVERSITY OF PITTSBURGH
SCHOOL OF LAW
3900 Forbes Ave., Room 322
Pittsburgh, PA 15260

December 8, 1998

Counsel for *Amici Curiae*

CALIFORNIA WOMEN'S LAW CENTER

CENTER FOR WOMEN POLICY STUDIES

CLEARINGHOUSE ON WOMEN'S ISSUES

THE CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.

EQUAL RIGHTS ADVOCATES

NATIONAL ASSOCIATION FOR GIRLS & WOMEN IN SPORT

THE NATIONAL ASSOCIATION OF SOCIAL WORKERS

NATIONAL COUNCIL OF JEWISH WOMEN

NATIONAL EDUCATION ASSOCIATION

NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

NOW LEGAL DEFENSE AND EDUCATION FUND

PEOPLE FOR THE AMERICAN WAY FOUNDATION

WOMEN EMPLOYED

WOMEN'S LAW PROJECT

THE WOMEN'S SPORTS FOUNDATION

THE YWCA OF THE USA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

LEGISLATIVE HISTORY

FEDERAL REGULATIONS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations dedicated to the achievement of equality of opportunity for all students without discrimination because of gender, race, national origin, disability or age.[1] Statements of interest of the *amici* are set forth in Appendix A.

INTRODUCTION

In this case, the National Collegiate Athletic Association ("NCAA") claims that it is not covered by the nondiscrimination requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"). It makes this claim despite the fact that the NCAA exists only as the creation of its member schools, the majority of which are federally funded and subject to Title IX, and despite the fact that its central function is to govern one of these schools' key educational programs, intercollegiate athletics, which Title IX was intended to address.

The member colleges and universities, now numbering about 1200, have chosen the NCAA as their coordinating vehicle for addressing athletics matters.[2] They have formalized this relationship with the NCAA through the payment of dues, which includes federal funds, and through other financial

---

[1] The parties' written consent to the filing of this brief has been filed with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] The NCAA promotes itself as "the organization through which the nation's colleges and universities speak and act on athletics matters at the national level." *The NCAA: General Information* (visited Nov. 30, 1998) <http://www.ncaa.org/about/>.

support,[3] in exchange for which the NCAA establishes rules of play and legislates upon many athletics-related issues of concern to its members. Member schools agree to abide by NCAA rules and assign to the NCAA the authority to enforce those rules on behalf of each individual school.[4] Sanctions for violating the rules range from prohibition from competition to termination of an institution's membership in the association.[5]

The vast authority assigned to the NCAA by its member schools is evidenced by NCAA legislation that affects virtually every aspect of a member institution's athletic program. From student eligibility requirements, to the maximum number of scholarships that may be awarded by sport and gender, to playing and practice seasons, member schools have transferred to the NCAA an enormous amount of control over their athletics programs.[6] It is beyond dispute that the NCAA is a

---

[3] *1998-99 NCAA Division I Manual* 19, Const., Art. 3, § 3.7 [hereinafter *NCAA Manual*].

[4] *Id.* at 1, Const., Art. 1, § 1.2(d)&(h); § 1.3.2.

[5] *Id.* at 54, Bylaw, Art. 10, § 10.4 (ineligibility of a student athlete for intercollegiate competition); *id.* at 330, Bylaw, Art. 19, § 19.6.2.2(j) (prohibition of a team from competition); *id.* at 332, Bylaw, Art. 19, § 19.6.3 (termination or suspension of an institution's membership). The mere threat of sanctions is often enough to change an institution's ways. *See, e.g., NCAA v. Tarkanian*, 488 U.S. 179, 187 (1988) (noting that when faced with possibility of sanctions, university chose to "[r]ecognize [its] delegation to the NCAA of the power to act as ultimate arbiter of [the issue]"); *NCAA v. Regents of the Univ. of Oklahoma*, 468 U.S. 85, 94-95 (1984) (describing how College Football Association ("CFA") never consummated television agreement negotiated independently of NCAA because of threatened broad-based sanctions by NCAA against CFA members).

[6] *NCAA Manual* at 131-78, Bylaw, Art. 14 (eligibility); *id.* at 192-99, Bylaw, Art. 15 (scholarships); *id.* at 227-316, Bylaw, Art. 17 (playing and practice seasons).

dominant player in the operation of the educational program or activity of intercollegiate athletics in our nation's colleges and universities.[7]

Given this assignment of responsibilities for intercollegiate athletics to the NCAA by its member schools, and federal funding of the responsibilities at issue, the NCAA is subject to Title IX under the statute, its implementing regulations, and amendments enacted by the Civil Rights Restoration Act of 1987 ("CRRA"), Pub. L. 100-259, 102 Stat. 28 (1988).[8]

---

[7] The NCAA's predominance in college athletics is widely acknowledged. *See* 18 Loy. L.A. Ent. L.J. 307, 328 (1998) ("[The] NCAA [has] unmitigated control over the market for college players."); 26 Loy. L.A. L. Rev. 1213, 1222 (1993) ("In terms of regulatory power, the NCAA is clearly the dominant organization in intercollegiate athletics."). While other athletic organizations exist, the NCAA is "the only entity with substantial power over intercollegiate athletics in the United States." *Id.* at 1222. The NCAA's prestige and the commercial opportunities it offers are powerful incentives for schools to obtain (and avoid losing) NCAA membership. *See* 31 J. Marshall L. Rev. 1303 n.102 (1998) ("[T]he question [is] whether anyone can afford to not be a member of the NCAA.").

[8] The posture of this case--dismissal pursuant to Federal Rule of Civil Procedure 12 (b)(6) and denial of the *pro se* plaintiff's motion to amend her complaint and allow for discovery--makes the factual record very slim. While the public record illustrates many underlying facts confirming the NCAA's coverage under Title IX, the information in the record of this case concerning the nature and purposes of federal funding received by the member schools, and the relationship of those funds to the NCAA and its responsibilities to the schools, is not fully developed. For example, two cases indicate that the NCAA is a potential direct recipient of a federal grant. *See Bowers v. NCAA*, 1998 U.S. Dist. LEXIS 85552, at *106-08 (D.N.J. June 8, 1998); *Cureton v. NCAA*, 1997 U.S. Dist. LEXIS 15529, at *6 (E.D. Pa. Oct. 8, 1997). Other relevant funds to the schools and the NCAA might also emerge were the plaintiff able to amend her complaint and proceed to discovery, as the Third Circuit decision allows.

STATEMENT OF THE CASE

Amici adopt the Respondent's Statement of the Case.

SUMMARY OF ARGUMENT

1. Title IX's plain language, implementing regulations, and amendments enacted by the CRRA support coverage of the NCAA. Title IX covers indirect as well as direct recipients of federal funds, and also covers entities that themselves may not receive federal funds but are subunits, successors, assignees or transferees of a recipient and stand in the shoes of the recipient with like obligations and functions. *See Grove City College v. Bell*, 465 U.S. 555 (1984); 34 C.F.R. § 106.2(h).

The NCAA is an indirect recipient of federal funds, because of dues received from its federally funded member colleges and universities to operate a part of their intercollegiate athletics programs that the federal funds support. These colleges and universities receive federal student financial aid that Congress intended for the general support of all the educational activities of the schools, including intercollegiate athletics.

Because the recipient colleges and universities have assigned and transferred key responsibilities to the NCAA to operate their intercollegiate athletics programs, and because the NCAA stands in the shoes of the recipients for purposes of governing their athletics programs, the NCAA is covered even if no federal funds are transferred through dues or otherwise.

The CRRA confirms that the NCAA is covered by Title IX. The NCAA is an entity created by two or more covered entities (the member colleges and universities), and hence is covered under subsection (4) of the CRRA. It is also covered under subsection (2) of the CRRA as a part of the operations of the covered schools themselves. All of the schools' operations are covered under subsection (2), regardless of whether the operations receive federal funds, and regardless of whether the

schools run the operations themselves or delegate this responsibility to another entity such as the NCAA. These schools have arranged for the NCAA to run key aspects of their intercollegiate athletic programs, and therefore the NCAA is covered under this provision as well. 20 U.S.C. § 1687 (2),(4).

2. Congress intended to eliminate sex discrimination in athletics by enacting Title IX. The legislative history demonstrates that Congress repeatedly reaffirmed Title IX's coverage of intercollegiate athletics. The importance of equality in athletics to women's education, employment opportunities, and health was recognized by Congress in its design of and support for Title IX. Thle NCAA's dominant role in intercollegiate athletics supports its coverage under Title IX.

ARGUMENT

I. TITLE IX'S PLAIN LANGUAGE, IMPLEMENTING REGULATIONS, AND AMENDMENTS ENACTED BY THE CRRA SUPPORT COVERAGE OF THE NCAA

A. Congress Intended Title IX to Have a Broad Reach, and Its Implementing Regulations, Which Are Entitled to Deference, So Provide

Congress enacted Title IX to prohibit sex discrimination in federally funded education programs and activities. By its own terms, Title IX's reach is expansive, stating simply: "No person in the United States shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[9] 20 U.S.C. § 1681(a).

---

[9] Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 all prohibit discrimination under programs or activities receiving federal financial assistance. *See* 42 U.S.C. § 2000d *et seq.* (Title VI); 29 U.S.C. § 794 *et seq.* (Section 504); 42 U.S.C. § 6101 *et seq.* (Age Discrimination

Congress has consistently demonstrated its intention that the determination of what is a program or activity receiving federal funds be made according to principles of broad coverage.[10]

Under Title IX's implementing regulations, a "recipient" of federal funds is defined as:

> any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2(h).[11]

This definition of "recipient" includes entities that receive federal funds directly or indirectly and operate an education program or activity that receives or benefits from such assistance. It also includes subunits, successors, assignees and transferees of such recipients.[12] The regulation defining

---

Act).

[10] The Brief for Respondent Smith reviews the broad statutory language used in Section 1681(a), which protects persons from discrimination under any federally funded program or activity, without limiting the protection to discrimination caused by the recipient itself. Thus, *amici* do not address this issue here.

[11] The regulations under Title VI, Section 504, and the Age Discrimination Act define "recipient" similarly. *See* 34 C.F.R. § 100.13(i) (Title VI); 34 C.F.R. § 104.3(f) (Section 504); 45 C.F.R. § 90.4(c)(2) (Age Discrimination Act).

[12] This brief does not focus on the NCAA's direct receipt of funds, although there is highly relevant evidence that the NCAA receives federal funds directly for its National Youth Sports Program. This

recipient has been approved by Congress and given deference by this Court since its adoption in 1975.[13]

At the time that the regulations were promulgated, the General Education Provisions Act[14] was in place, under which Congress was afforded an opportunity to disapprove any of the Department of Health, Education and Welfare's ("HEW") regulations[15] that it thought were inconsistent with Title IX. Congress reviewed the regulations, neither House passed a disapproval resolution, and the regulations went into effect. *See North Haven*, 456 U.S. at 533 n.24; 121 Cong. Rec. 23,846 (1975). Congress' failure to disapprove the regulations "strongly implies that the regulations accurately reflect congressional intent." *Grove City*, 465 U.S. at 568.

Relying in part on the legislative history and the broad wording of Title IX itself, this Court ruled that the indirect receipt of federal funds triggers Title IX coverage. *See Grove City*, 465 U.S. 555 (holding that indirect receipt of federal funds through federal assistance to students triggers Title IX coverage of the college). In response to Grove City College's argument that none of its programs directly received any federal

---

evidence is addressed in Respondent Smith's brief as well as in Brief for *Amici Curiae* Trial Lawyers for Public Justice ("TLPJ") and Southern Poverty Law Center ("SPLC").

[13] This Court has accorded the Title IX regulations particular deference as an interpretation of the statute. *See Grove City College v. Bell*, 465 U.S. 555, 567-68 (1984).

[14] Pub. L. 93-380, § 509(a)(2), 88 Stat. 567, 20 U.S.C. § 1232(d)(1) (1970 & Supp. IV 1974).

[15] The former HEW promulgated the regulations initially in 1975. HEW's functions under Title IX were transferred in 1979 to the Department of Education ("DOE"), which subsequently adopted the regulations without substantive changes. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 515-17 & nn.4&5 (1982).

assistance, this Court noted that the language of the statute does not indicate that Congress perceived any difference between direct and indirect federal assistance:

> Nothing in § 901(a) suggests that Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulation.

Id. at 564. Citing its own precedent that Title IX should be "accord[ed] a sweep as broad as its language," *North Haven*, 456 U.S. at 521, this Court in *Grove City* refused to read into Title IX "a limitation not apparent on its face." *Id.* at 564; *see also Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 603 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975) (stating that narrow readings of Title VI coverage are inappropriate).[16]

Congress later expressly endorsed the longstanding definition of "recipient" when it passed the CRRA. Congress stated clearly its intent that the CRRA does not "change in any way who is a recipient of federal financial assistance," and stated that the "purpose of the Civil Rights Restoration Act of 1987 is to reaffirm the pre-*Grove City College* judicial and executive branch interpretations [of Title IX's scope] and enforcement practices which provided for broad coverage of the

---

[16] Because Title IX was patterned after Title VI, *see Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979), Congress was aware of how Title VI's regulations were being interpreted and could have changed Title IX if it had so desired. Its failure to do so provides further evidence of its approval of Title IX's definition of recipient. *See id.* at 694-95 ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.").

antidiscrimination provisions of [the] civil rights statutes." Report of the U.S. Senate Comm. on Labor and Human Resources, 100th Cong., 1st Sess., at 2 (1987).

In addition to the clear intention that the indirect receipt of federal funds trigger coverage, the meaning of the terms "subunit, successor, assignee, or transferee thereof" was debated in early versions of the CRRA. These terms were explained as "standard contract language applied to situations in which the successor, assignee, or transferee stands in the shoes of the recipient of the federal financial assistance, with like obligations and functions of the recipient." *See, e.g.*, H.R. Rep. No. 98-829, Pt. 2, at 32 (1984) [hereinafter House Comm. Rep.]. Again Congress demonstrated that it was aware of this part of the regulation and approved of it.[17]

B. The NCAA Is a Recipient for Purposes of Title IX Coverage

The NCAA fits within this regulatory definition of "recipient" on two counts. It indirectly receives federal funds for an educational program, intercollegiate athletics, which it operates. It also serves as a subunit, successor, assignee or transferee of other recipients -- its member schools.

---

[17] The House Report cites an example in which a City Housing Authority receives Community Development Block Grants from the federal government. If the Housing Authority then subcontracts the property rehabilitation work to a private developer, the developer would come within the "successor, assignee or transferee" clause and hence would be covered by Title VI, Section 504, and the Age Discrimination Act. The report explains, however, that indirect recipients resulting from transactions outside the purpose of the federal funds would not be covered under this provision. For example, that same Housing Authority's payment of an electric bill does not subject the Electric Company to the nondiscrimination statutes, because the payment of the bill is unrelated to the function for which the federal funds were given to the Housing Authority.

1. The NCAA Indirectly Receives Federal Funds to Operate an Educational Program

It is beyond dispute that the NCAA operates an educational program--intercollegiate athletics--within the meaning of Title IX. Despite the NCAA's protestations to the contrary, it also receives federal funds from its member schools precisely to operate this educational activity.

The NCAA's central role is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body." *Tarkanian*, 488 U.S. at 182.[18] It is to support this central role that the member schools pay dues to the NCAA, and federal funds received by the schools may cover just such purposes. Almost all NCAA members receive federal student financial aid that Congress has explicitly intended for the general support of all of the member schools' educational programs and activities -- of which intercollegiate athletics is one. *See* S. Rep. 100-64 at 20 (stating that "funds from [student federal aid] flow throughout the institution and support all of its programs").[19] Because its member schools have delegated to the NCAA key aspects of the operation of their intercollegiate athletic programs and because they pass on federal funds intended to support all educational activities, including intercollegiate athletics, to the

---

[18] The NCAA is treated as a tax-exempt organization operated exclusively for educational purposes. *See National Collegiate Realty v. Bd. of County Comm'rs*, 690 P.2d 1366 (Kan. 1984) (NCAA stated before the Kansas Board of Tax Appeals that it is a § 501(c)(3) organization); 26 U.S.C. § 501(c)(3) (granting tax-exempt status to corporations organized and operated exclusively for educational purposes).

[19] It is difficult to determine, given the posture of this case, whether there are other federal funds flowing from its member schools to the NCAA.

NCAA in the form of dues to do so, the NCAA is an intended recipient covered by Title IX. Contrary to the NCAA's assertion, the member schools' extension of federal funds to the NCAA in exchange for its governance of their athletic programs does not "violate the terms on which the aid was extended to the institution." Pet. Br. at 20. The NCAA member schools' use of student aid money, once received by them, is not restricted in any way by the federal government.[20]

Lower courts have relied on this regulatory definition of "recipient" to hold athletic associations similar to the NCAA accountable under Title IX. In *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994), the Sixth Circuit held the Kentucky High School Athletic Association subject to Title IX because it received dues from its federally funded member schools and performed the functions of the Kentucky Board of Education with respect to interscholastic athletics.[21] Other courts have followed suit, holding athletic associations and

---

[20] Even looking at federal student aid funds more narrowly as going to the financial aid program alone, by its own admission, the NCAA is responsible for key parts of the financial aid programs of each of its member colleges and universities. Pet. Br. at 5. It sets ceilings on the number, amount, and terms of scholarships for student athletes at its member schools. As the CRRA's legislative history demonstrates, when a college participates in a federal student aid program, the intended recipient of the aid is the college as a whole. However, even under the narrowest reading that the intended recipient is only the college's financial aid program, given its assigned authority for a central component of the financial aid program for student athletes, the NCAA is an "intended recipient" of federal financial aid.

[21] In *Horner*, the Kentucky Board of Education delegated the management of interscholastic athletics to the Kentucky High School Athletic Association pursuant to a state statute. *See* 43 F.3d at 272. Clearly, Title IX coverage does not turn on whether the delegation of responsibility for managing an education program is by statute, or by voluntary agreement, as in the case of the NCAA. *See Smith v. NCAA*, 139 F.3d 180, 188 (3rd Cir. 1998).

conferences subject to Title IX by virtue of their indirect receipt of federal funds and their responsibilities for governing member schools' interscholastic athletic programs. *See, e.g., Dennin v. Connecticut Interscholastic Athletic Conference*, 913 F. Supp. 663 (D. Conn. 1996), *appeal dismissed as moot*, 94 F.3d 96 (2d Cir. 1996) (holding athletic conference subject to Section 504); *Sandison v. Michigan High Sch. Athletic Ass'n*, 863 F. Supp. 483 (E.D. Mich. 1994), *rev'd in part on other grounds*, 64 F.3d 1026 (6th Cir. 1995) (holding athletic association subject to Section 504); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 857 F. Supp. 654 (E.D. Mo. 1994), *rev'd on other grounds*, 40 F.3d 926 (8th Cir. 1994) (same).[22]

---

[22] The NCAA argues that it is not covered by Title IX because the remedy of fund termination is unavailable. The NCAA is wrong, both because fund termination is possible in the case of the NCAA, just as it is in other indirect recipient circumstances, and because fund termination is not necessary for coverage in any event. The CRRA makes clear that coverage of an institution is broader than the particular part receiving federal funds, and under the "pinpoint" fund-termination provision of Section 902(1), only the particular funds supporting the discrimination may be terminated. Section 902(2) provides for a second way of enforcement beyond fund termination - by any other means authorized by law. 20 U.S.C. § 1682. Such means have included referral of the matter to the Department of Justice for court action. In the event of a Justice Department enforcement action, no fund termination is at issue. Moreover, as an indirect recipient, the NCAA's funds would be terminated in the same way that a university that receives indirect funding through student financial assistance would have its funds terminated. In the latter situation, the student receiving the federal financial assistance would not be able to use those funds to attend the discriminating university. *See Grove City* and *Bob Jones University*. Similarly, the NCAA's indirect funding could be terminated by banning member recipients from providing financial support to the NCAA in exchange for the NCAA's governance of their intercollegiate athletics program. Of course, in practice, voluntary compliance with the law is the way almost all compliance is secured, with Justice Department actions or fund termination proceedings extremely rare under any of the civil rights statutes.

2. The NCAA Serves as a Subunit, Successor, Assignee or Transferee of Recipients With Respect to Their Educational Programs and Activities

The NCAA, in its role of governing and regulating intercollegiate athletics, also acts as a subunit, successor, assignee or transferee of its federally funded member schools and hence is a recipient within the meaning of Title IX in this respect as well. The NCAA fits this part of the regulatory definition of recipient because member schools, which are recipients themselves, delegate their functions with respect to intercollegiate athletics to the NCAA. It is unnecessary to meet this part of the regulation for any transfer of federal funds to have taken place at all.[23]

There can be no doubt that the NCAA is a surrogate for its member colleges and universities and substantially controls the operation of their intercollegiate athletic programs. As one court stated, in a case in which the NCAA itself claimed that it was an educational institution, based on its relationship with its member schools, and was thus entitled to a sales tax exemption:

> The activities of the NCAA are of the type the

---

[23] When reviewing this part of the regulation defining recipient, the House Report used the particularly instructive example of a parking garage in a university-owned building financed with federal funds, which was leased by the university to a private operator. In that example, the university presumably did not give funds to the garage operator. In fact, the lease would have yielded funds from the operator to the university. Nonetheless, even without any transfer of federal funds, the garage operator was covered by Title IX as it was operating a part of the federally funded building for the recipient just as the NCAA is operating a part of its members' federally funded educational programs. *See* House Comm. Rep. at 32.

> member universities and colleges could accomplish by committee except for the number of schools involved and the complexity of the world of major intercollegiate sports. The work of the NCAA staff is that which the members have decreed it shall do for the mutual benefit of, and assistance to, the member institutions' educational programs. We must conclude that the NCAA is but an extension of the member universities and colleges . . . .

NCAA v. Kansas Dep't of Revenue, 781 P.2d 726, 730 (Kan. 1989). Likewise, this Court recognized in *Tarkanian* that NCAA rules and enforcement procedures "are an essential part of the intercollegiate athletic program of each member institution." *Tarkanian*, 488 U.S. at 195. The source of the NCAA's regulations is not any one member school, "but the collective membership speaking through [its] organization." *Tarkanian*, 488 U.S. at 193.

Member institutions have formally assigned or transferred functions with respect to athletics to the NCAA and have agreed to be bound by the rules and regulations of the NCAA. In addition to delegating to the NCAA the responsibility for managing intercollegiate athletics, member schools have paid dues and have assigned or transferred many rights to the NCAA, such as their rights to money from championship events, including money from ticket sales; program sales and advertising; radio, television and movie rights, and more. *See NCAA Manual* at 419-20, Art. 31, § 31.4.2. The individual schools are only entitled to a small allowance of the net receipts from these events. *See id.* at 420, § 31.4.4.1. According to its own brief, "the NCAA funds its activities through the receipt each year of approximately $200 million in revenues from television royalties, championship events, and various sales and services." Pet. Br. at 4. All of this money would be retained by the NCAA's member schools if they did not delegate control over

the governance of their athletic programs to the NCAA.[24]

The NCAA's contention that subjecting it to Title IX would mean that virtually everyone who does business with a recipient will be covered, is belied by the language of the statute and regulations, as well as the legislative history. As the 1984 House Committee Report indicates, the performance of obligations flowing from transactions outside the purpose or character of the federal funds does not trigger coverage of the successor, assignee, or transferee. *See* House Comm. Rep. at 32. However, here, the assignment and transfer of obligations to the NCAA from colleges and universities receiving federal assistance are clearly for the purpose of providing an educational program or activity supported by federal funds.[25] Therefore, the NCAA, as a subunit, successor, assignee, or transferee providing the educational intercollegiate athletics program, is covered by Title IX.

****

The NCAA's reliance on *United States Department of*

---

[24] Given that the great bulk of the NCAA's revenues comes from money that its member schools would have otherwise kept, its statement that it receives only about $900,000 in dues annually understates substantially the financial support flowing from its members.

[25] In fact, an enormous loophole would be created were an entity such as the NCAA not considered covered and the implications would be contrary to common sense and Title IX's fundamental purposes. For example, if several universities jointly managed an archaeological dig and appointed a joint governing body to administer the research and to control the number of students from each school who would be allowed access to the site and the maximum amount of student aid each researcher could receive, that joint governing body could no more discriminate based on sex than could any of the universities involved in the research. This result would be the same regardless of whether the governing body received funds from the universities, charged the students directly, or received other sources of funds.

Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986), to support exempting the NCAA from coverage of Title IX is misplaced. In *Paralyzed Veterans*, this Court held that commercial airlines were not subject to Section 504 despite their benefitting--in the form of runways, taxiways, and ramps--from federal funds extended to airport operators. *See* 477 U.S. at 606-07. In contrast with this case, there was no contention in *Paralyzed Veterans* "that [the] airlines actually receive or are intended to receive money from the [federal government]." In fact, this Court found that "[n]ot a single penny of the money is given to the airlines." Id. at 605. The NCAA, in contrast, is an actual indirect recipient of federal student aid funds intended to support all educational activities of the schools, through the dues the schools pay NCAA to operate one of their educational activities.

In addition, the NCAA is a subunit, assignee, or transferee of its recipient member schools entrusted to govern key aspects of their athletic programs, while the airlines in *Paralyzed Veterans* did not govern any of the operations of the airport. While the airlines in *Paralyzed Veterans* merely used the federally funded facilities, the NCAA controls and regulates how the federal recipients' intercollegiate athletic programs will operate.[26]

Moreover, the NCAA's reliance on this Court's decision in *Gebser v. Lago Vista Independent School District*, 118 S. Ct.

---

[26] The NCAA's reliance on *NCAA v. Califano*, 444 F. Supp. 425 (D. Kan 1978), *rev'd*, 622 F.2d 1382 (10th Cir. 1980), is also misplaced. In *Califano*, the issue of whether the NCAA was a recipient was not explored, no factual record was developed, and no review of legal principles was conducted regarding the NCAA's recipient status. An exploration of the actual facts would have revealed that at the time, the NCAA received federal funds directly for its National Youth Sports Program, as discussed in Brief for *Amici* TLPJ and SPLC, and therefore was clearly a recipient, under even the narrowest meaning of the term.

1989 (1988), is also unavailing. In *Gebser*, there was no doubt that the school was a recipient; the question before the Court was when a recipient could be held liable for damages based on the misconduct of its agent. *See id.* The court held that a school district would not be held liable in damages as a *respondeat superior* for the conduct of an employee who sexually abused a student, unless an official of the school district with the authority to initiate corrective measures had actual notice of the discriminatory conduct. *See id.* at 1998-99. The Court's standard for damages, however, does not control the issue of coverage, or even the issue of other forms of relief beyond damages, including administrative enforcement that would flow from recipient status. *See id.* at 2000. Moreover, the NCAA is allegedly the knowing, discriminatory actor, not the unknowing management structure removed from the discrimination that existed in *Gebser*. Rather than precluding Title IX coverage, the Court's *Gebser* opinion invites it in this case. Under the Court's *Gebser* analysis, control and knowledge, which the NCAA clearly has regarding its own rules, triggers liability for damages beyond the question of coverage.[27]

C. The Civil Rights Restoration Act Amendments to Title IX Underscore Coverage of the NCAA

While for the reasons described above, the NCAA is a recipient within the meaning of Title IX, after the passage of the CRRA, with the new definition of "program or activity receiving federal financial assistance," it fits within that rubric as well.

---

[27] The NCAA also mischaracterizes Smith's statement in her Brief in Opposition that the NCAA acts as an agent of its member schools as being based on a theory of agency or vicarious liability. *See* Br. Opp. at 7; Pet. Br. at 26-28. The reference to "agent," conveyed a relationship between the NCAA and its member schools analagous to the regulation's "subunit, successor assignee or transferee" language. As discussed *supra*, the NCAA stands in the shoes of its member schools with respect to the governance of intercollegiate athletics and hence fits within the regulatory definition of recipient.

While Congress in enacting the CRRA supported the holding in *Grove City College v. Bell* that student receipt of federal financial assistance led to Title IX recipient status for the school attended by the student, it disagreed with the Court's holding that the financial aid program, and not the school as a whole, was covered under Title IX. Thus, the *Grove City* decision prompted a strong congressional response. Within weeks of the Court's decision, bills were introduced in Congress to overturn that aspect of the Court's *Grove City* decision. *See, e.g.*, H.R. 5490, 99th Cong. (1984). The CRRA, was enacted into law three years later. 20 U.S.C. § 1687.

The CRRA broadly defines a "program or activity" that receives federal funds to mean all of the operations of a list of entities -- including colleges and universities; private organizations principally engaged in education; and any other entity established by two or more of the listed entities what Congress termed the "catch-all" provision.[28]

The language, structure and intent of Congress in passing the CRRA was clear - to ensure that a broad range of entities were covered in their entirety, when they have responsibility for federally funded programs.[29] In fact, the NCAA clearly fits

---

[28] *See* S. Rep. 100-64 at 19.

[29] The CRRA provides in relevant part:

For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of–

. . . .

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of this title), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship–

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

within the CRRA. The NCAA acknowledged as much in its testimony at hearings when Congress first began consideration of the legislation. In a prepared statement submitted for the record, the NCAA stated its belief that if Congress adopted a scheme whereby federal financial assistance to one university's program extended Title IX coverage to the university's other programs, by analogy, voluntary athletic associations such as the Big Eight Athletic Conference would be covered.[30] While the NCAA did not explicitly mention its own status, its concerns regarding the coverage of voluntary athletic associations were based on a proper reading of Congress' purposes and the effect of the CRRA once passed.

1. The NCAA is Subject to Title IX Because It Is an Organization Established by Two or More Colleges or Universities That Receive Federal Funds

The "catch-all" provision, subsection (4) of the CRRA, provides that an entity created by two or more otherwise covered entities is itself subject to Title IX. The NCAA is clearly

---

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance . . . .

20 U.S.C. § 1687.

[30] *See Hearings Before the House Education and Labor Comm. and the Subcomm. on Civil and Constitutional Rights*, House Judiciary Comm., 98th Cong., 2d Sess. at 225 (May 21, 1984). [hereinafter *1984 Joint Hearings*].

such an entity, as it was established by colleges and universities that are explicitly listed in the CRRA as covered themselves. *See* 20 U.S.C. § 1687(2)(A).

Pursuant to this catch-all provision, lower courts have held the NCAA, liable under Title VI and Section 504. In *Cureton v. NCAA*, the court held the NCAA to be a program or activity covered by Title VI under subsection 4. 1998 U.S. Dist. LEXIS 16196, at *6 and in *Bowers v. NCAA*, the court held that the NCAA is a program or activity subject to Section 504 because it "squarely fits within the statutory language of [subsection (4)]" as an entity established by two or more colleges and universities. 1998 U.S. Dist. LEXIS 8552, at *96-*98.

The NCAA claims that before an organization can be brought under Title IX's coverage by subsection (4), the organization must itself receive federal financial assistance. Pet. Br. at 31. But this interpretation should be rejected because it would render subsection (4) mere surplusage. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion) (Scalia, J.) (It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"). Subsections (3)(A) and (3)(B), when taken together, already apply Title IX to *any* private organization if *any* part of that organization is extended federal financial assistance directly. For example, if two separate universities form a corporation, and the government extends federal financial assistance to the corporation directly, that corporation is subject to Title IX under subsection (3)(A)(i) or (3)(B). The NCAA's interpretation would render subsection (4) unnecessary because the organization would already be covered because of the federal assistance it receives directly.[31] Thus, the NCAA is covered by

[31] The example within the CRRA's legislative history that the NCAA cites for the proposition that entities covered under subsection (4) must receive federal financial assistance directly to be covered by Title IX is inapposite. The NCAA refers to the example offered in S. Rep. 100-64 concerning three Catholic parishes within one Catholic diocese. In the

Title IX under subsection (4): a contrary conclusion would be inconsistent with Congress' goal of "meaningful coverage and effective enforcement" of Title IX, S. Rep. 100-64 at 6, and its explicit purpose, that subsection (4) serve as a catch-all provision and apply to entities not reached by the other enumerated subsections.

2. The NCAA is Subject to Title IX as an Operation of Its Federally Funded Member Schools

Subsection (2) covers all operations of covered colleges and universities. If the NCAA disputes that it is a separate creation of its covered member schools, and thereby covered under subsection (4), it would be hard pressed to argue that it was not an operation of the schools themselves, as its own testimony seemed to recognize.[32]

The fact that the NCAA's members choose to conduct some part of the operations of their covered educational program by

example, each parish separately receives federal assistance. The report concludes that the diocese to which the parishes belong is not covered under § 1687(4). The reason the diocese is not covered while its three parishes are, however, is that under subsection (3)(B), if federal aid is extended only to a facility or division of a corporate entity, only that facility or division is covered by Title IX. The parishes constitute separate facilities under the "geographically separate facility" provision of subsection 3(B) and are not separate organizations with legal identities distinct from the dioceses. By contrast, the schools that make up the NCAA have legally distinct identities, which they retain while still being "parts" of the NCAA.

[32] *See 1984 Joint Hearings* at 225, where it described voluntary athletics associations as operations of colleges and universities. See also the statement of the court in *NCAA v. Kansas Dep't of Revenue*, 781 P.2d at 730 ("We must conclude that the NCAA is but an extension of the member universities and colleges.").

arrangement with the NCAA rather than by themselves does not make the NCAA's role and responsibilities any less an operation of the schools. The NCAA's central role in the management of each member schools' athletic programs makes the NCAA a part of the operation of each member school within the meaning of the CRRA.

Courts have held analogous entities to be covered as operations of covered schools themselves, even when those entities were separate from the schools. *See Graham v. Tennessee Secondary Sch. Athletic Ass'n*, No. 1:95 CV044, 1995 WL 115890 (E.D. Tenn. Feb 20, 1995), *appeal dismissed*, 107 F.3d 870 (6th Cir. 1997) (upholding Title VI claim against the athletic association because it is an operation of the state's schools); *Association of Mexican-American Educators v. California*, 836 F. Supp. 1534, 1542-45 (N.D. Cal. 1993) (upholding Title VI claim against California Commission on Teacher Credentialing, which did not directly receive federal funds, because it is as an operation of the state's school system, which receives federal funds).

It is the member schools whose athletics operations the NCAA relies on to generate revenues, and to provide facilities and participants for events. In its brief, the NCAA pointed to the $200 million in revenues for selling the rights to broadcast the NCAA events. Pet. Br. at 4. These events are intercollegiate athletic competitions between federally funded student athletes at federally funded schools. For example, when millions of viewers around the world watch the NCAA's "Final Four" national basketball championship, and increasingly the Women's "Final Four," they do so to watch their favorite colleges, universities, and student-athletes compete. It is the member schools' operations, and their students that the NCAA is supervising and upon which it relies.

But for the federally funded schools that build, maintain, and operate the facilities in which these contests occur and pay for the salaries of the coaches, assistants, and trainers who

manage these teams, there would be no NCAA championships. But for the federally assisted student athletes who are extended federal financial assistance, there would be no teams to compete and no NCAA championship games to be broadcast. But for the federally funded member schools that pay for the NCAA, and abide by its rules, there would be no NCAA. Thus, the NCAA is subject to the antidiscrimination requirements of Title IX because it is controlling central aspects of the schools' educational operations.[33]

****

In sum, the CRRA ensured that substance must prevail over form, and that if an entity is responsible for discrimination under a program or activity receiving federal funds – as the NCAA is alleged to be in its waiver practices in this case – it must be held accountable under Title IX.[34]

II. CONGRESS' INTENTION TO ELIMINATE SEX DISCRIMINATION IN INTERCOLLEGIATE ATHLETICS THROUGH TITLE IX SUPPORTS NCAA COVERAGE

---

[33] In fact, it is also possible to view the NCAA as covered under subsection (3)(A)(ii) of the CRRA, for it is without question a private educational organization. Its member schools are the NCAA's parts, and given the schools' receipt of federal funds, the NCAA as a whole is covered.

[34] While the NCAA correctly states that the CRRA left in place the *Paralyzed Veterans* holding that the airlines in that case were not recipients of federal financial assistance for purposes of Section 504, the airlines did not fit within subsection (4), for they were not created by the covered airport operators. Nor were the airlines a part of the airport operators running operations for them, as is necessary for coverage under subsection (2) in the case of colleges and universities.

A. Congress Explicitly Addressed Intercollegiate Athletics as Central to Title IX

The legislative history of Title IX is characterized by Congress' repeated rejection of attempts to weaken its application to intercollegiate athletics and by Congress' recognition of the need to remedy sex discrimination in intercollegiate athletic programs. Intercollegiate athletics has been a major focal point in congressional debates relating to Title IX. In 1974, for example, Congress not only rejected a proposal to exempt revenue-producing intercollegiate athletic programs, but actually directed the Secretary of HEW to prepare regulations implementing Title IX which included "with respect to intercollegiate athletics reasonable provisions considering the nature of particular sports."[35] Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974); *see also Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor*, 94th Cong., 1st Sess., at 21 (1975) [hereinafter *Sex Discrimination Regulations*] (describing the relevant history).

Acting on this explicit delegation of rulemaking authority, HEW issued proposed regulations in June of 1974, including specific provisions addressing intercollegiate athletics. The proposed regulations were subjected to a public comment period that produced nearly 10,000 comments. *See Sex Discrimination Regulations* at 438 (testimony of Caspar Weinberger). The large number of comments addressing intercollegiate athletics prompted then-Secretary of HEW Caspar Weinberger to remark that "the most important issue in the United States today is intercollegiate athletics, because we

---

[35] Subsequent efforts to restrict Title IX's coverage of intercollegiate athletics also failed. *See* H.R. 8394, 94th Cong., 121 Cong. Rec. 21,685 (1974) (bill amending Title IX to protect revenue produced by an athletic team from use by any other team unless the first team did not need the funds for itself); S. 2106, 94th Cong., 121 Cong. Rec. 22,778 (1975) (bill amending Title IX to exempt revenue-producing sports).

have an enormous volume of comments about them." *Id.*

HEW issued its final regulations in 1975, and Congress held extensive hearings on the regulations, focusing particular attention on the need to address the pervasive sex discrimination in intercollegiate athletics programs. The hearings produced a voluminous record documenting such discrimination.[36] *See Sex Discrimination Regulations, supra.*

Resolutions were introduced in both Houses disapproving the regulations insofar as they applied to athletics, *see* S. Cong. Res. 52, 121 Cong. Rec. 22,940 (1975); H. Cong. Res. 311, 121 Cong. Rec. 19,209 (1975), and in their entirety, *see* H. Cong. Res. 310, 121 Cong. Rec. 19,209 (1975); S. Cong. Res. 46, 121 Cong. Rec. 17,300 (1975). None of the resolutions passed, and the regulations went into effect on July 21, 1975. *See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (1979) (summarizing relevant history)

Title IX's application to intercollegiate athletics has enhanced educational opportunities for young women in many

---

[36] Many members of Congress spoke to this issue. *See Sex Discrimination Regulations* at 175 (remarks of Sen. Bayh) ("I have heard of no one making the argument that athletics should not be covered by Title IX who does so on the premise that there is not discrimination."); *see also id.* at 58 (remarks of Mr. Simon) ("I think we have to recognize that we have had some failures here in the past in not encouraging female sports."); 121 Cong. Rec. 24,035 (1975) (remarks of Sen. Clark) ("A look at present spending figures reveals an unbelievable inequity -- of the $300 million spent annually on collegiate athletic programs, only 2% is spent on women's athletics."); 121 Cong. Rec. 20,714 (1975) (remarks of Sen. Javits) ("Sex discrimination in education takes many forms . . . . [A]thletic programs are restricted and financial aid distributed in a biased manner."); 120 Cong. Rec. 20,668 (1974) (remarks of Hon. Robert P. Hanrahan) ("Mr. Speaker, there has always been sex discrimination involved in athletics.").

respects. Title IX has led to the availability of athletic scholarships, and they in turn have sharply increased the ability of young women to pursue a college education and to choose from a wider range of schools. Athletic scholarships for women were almost nonexistent and many colleges had no women's sports programs at all. *See* U.S. Comm'n on Civil Rights, Pub. No. 63, *More Hurdles to Clear: Women and Girls in Competitive Athletics* (1980). Prior to the passage of Title IX, only 32,000 women per year played college sports. *See* 44 Fed. Reg. 71,413, 71,419 (1979). Currently over 110,540 women participate in college athletics. NCAA, *Participation Study* (1995).

Despite these increased opportunities, however, the full potential of Title IX in the area of intercollegiate athletics has not yet been realized. Recognizing the need for continued enforcement of Title IX, Congress continues to legislate in this area. For example, in 1998 the "Fair Play Act" was passed, requiring the public availability of data describing the degree of compliance with Title IX's mandate of equal opportunity in intercollegiate athletics. Higher Education Amendments of 1998, Pub. L. 105-244 (1998). Congress found that despite the important advances made under Title IX, women have not yet achieved equity in intercollegiate athletics. The data has shown that many problems remain, and in the area of scholarship inequities, for example, schools have pointed to NCAA scholarship rules as creating barriers to the removal of the inequities, *See, e.g.*, Jim Naughton, *Focus of Title IX Debate Shifts from Teams to Scholarships*, Chron. of Higher Educ., May 29, 1998, at A45.

In order to implement Congress' intent in enacting Title IX, coverage of the NCAA is particularly important. The instant case highlights that importance, for the challenged conduct is a rule or decision by the NCAA itself -- its manner of granting eligibility waivers -- not the action of any individual school.

Moreover, the argument that coverage of the NCAA is unnecessary because effective relief can be obtained from an

individual federally funded school, which must comply with Title IX notwithstanding the NCAA's rules, ignores the very real consequences of violating NCAA rules. Schools are subject to sanctions for so doing, including prohibition from competition or termination of membership. Thus, even if a plaintiff obtained a judgment ordering a particular school not to implement a discriminatory NCAA rule, that judgment would not restrict the NCAA, and the school then would be subject to sanctions by the NCAA and would be excluded from NCAA-sponsored competition. In the end, therefore, the plaintiff and other athletes at the institution might lose valuable opportunities for participation and competition, and not secure effective relief.[37]

Thus, subjecting the NCAA itself to Title IX is essential to achieving the statute's purposes. Any decision to the contrary would frustrate Congress' intent to eliminate sex discrimination in athletics.

B. Participating in Athletics Has Far-Reaching Benefits

Sports offer much to female athletes who participate in them in a variety of ways. In 1997, the President's Council on Physical Fitness and Sport released a report on girls' involvement in physical activity and sports. The report affirmed the basic premise that sports and physical activities

---

[37] In fact, in a pending case against the Michigan Athletic Association, plaintiffs have alleged that several school districts have protested unsuccessfully to the association to change a rule which schedules tournament play for certain women's teams off season. These school districts are faced with the choice of withdrawing from the tournaments or acquiescing in a discriminatory practice hurting their female students' opportunities for scholarships and other benefits that in-season tournaments would provide. *See Communities for Equity v. Michigan High Sch. Athletic Ass'n*, No. 1:98CV479, 1998 WL 804829 (W.D. Mich. Nov. 16, 1998) (order denying defendant athletic association's motion for summary judgment, *inter alia*, in which it is argued that it is not covered by Title IX).

are highly beneficial for girls, offering a panoply of physiological, psychological, sociological and mental health benefits. *See The President's Council on Physical Fitness and Sports Report: Physical Activity & Sports in the Lives of Girls* xii (Spring 1997) [hereinafter *President's Council Report*].

Athletic participation expands academic opportunities and promotes academic achievement. The availability of athletic scholarships sharply increases young women's ability to pursue a college education and to choose from a wider range of schools, thus opening more doors for women. Indeed, for many low-income women, intercollegiate athletics provides a gateway to an education that they otherwise could not obtain. *See, e.g., Cohen v. Brown Univ.*, 991 F.2d 888, 891 (1st Cir. 1993). On average, female athletes fare better academically than their nonathletic counterparts. *See President's Council Report* at xxiii. Young women who participate in sports are more likely to graduate from high school. *See* The Women's Sports Foundation, *Minorities in Sports: The Effect of Varsity Sports Participation on the Social, Educational and Career Mobility of Minority Students* 27 (Aug. 15, 1989). They also have higher grades and higher scores on standardized tests than non-athletes. Thus, athletic participation enhances the overall educational experiences of many young women.[38]

Second, women develop a range of skills through participation in athletics, all of which are crucial to success in employment and adult life, generally. Those skills include the ability to work with a team, to perform under pressure, to set

---

[38] Athletic participation has been proven to yield similar benefits for Black and Hispanic students. Minority athletes receive higher grades, are less likely to drop out, and aspire to hold leadership positions in their communities in greater percentages than their non-participating counterparts. *See* Carol Herwig, *Report Stresses Role of Academics; High School Athletes: Winners On, Off Field*, USA Today, Aug. 16, 1989, citing Women's Sports Foundation Report: *Minorities in Sports* (1989).

goals, and to take constructive criticism. Importantly, participation in sports can teach problem-solving skills. *See President's Council Report* at 64. Participation in intercollegiate athletics offers young women "an opportunity to exacuate [sic] leadership skills, learn teamwork, build self-confidence, and perfect self-discipline." *Cohen*, 991 F.2d at 891.

Third, regular and rigorous physical exercise from sports provide enormous health benefits to women. Sports participation decreases a young woman's chance of developing heart disease, osteoporosis, and other health related problems. *See* Donna A. Lopiano, *Testimony Before the U.S. Subcomm. on Consumer Affairs, Foreign Commerce and Tourism*, Oct. 18, 1995. A 1998 study found that former college athletes had a 35% less chance of developing breast cancer and a 61% less chance of developing reproductive cancer compared to non-athletes. *See* Carol Krucoff, *Exercise and Breast Cancer*, Saturday Evening Post, Nov. 1995, at 22. Increased fitness levels can contribute to better posture, the reduction of back pain, and the development of physical strength and flexibility. *See President's Council Report*, at 14. In terms of emotional and mental health, women who participate in sports have a higher level of self-esteem, a lower incidence of depression, and a more positive body image. *See* Colton & Gore, Ms. Foundation, *Risk, Resiliency, and Resistance: Current Research on Adolescent Girls* (1991); The Women's Sports Foundation, *Miller Lite Report* 3 (Dec. 1985). Through participation in sports, women establish constructive relationships with peers, are influenced by healthy role models, experience success, and learn how to deal with physiological and psychological changes. *See President's Council Report* at 64. Thus, it is clear that sports participation also promises young women important health benefits.[39]

---

[39] A recent book provides a comprehensive look at the impact of sports in the lives of girls and further provides a guide for parents who would like to see their daughters succeed. The authors talked with girls who play sports, professional athletes, parents, educators,

Although women continue to have a disproportionately low share of athletic opportunities, women have made a tremendous contribution to the world of sports. Indeed, female athletes triumphed in both the 1996 Atlanta and 1998 Nagano Olympic Games. And, in 1996, female athletic contributions were acknowledged in the formation of the Women's National Basketball Association, where early reports indicated that viewing and attendance of games exceeded predictions of popularity and interest. *See Gender Gaps: Where Schools Still Fail Our Children*, AAUW Educ. Found., Oct. 14, 1998 (citing G. Gross, *Girls Gleefully Claim a League of Their Own*, N.Y. Times, Aug. 4, 1997, at A1).

While Title IX's goal of full equality of opportunity in sports has yet to be realized, Title IX has played a vital role in opening up competitive athletics to women and girls. Thus, the commitment to providing young women equal opportunities in athletics must be sustained and the NCAA must not be permitted to ignore its Title IX responsibilities.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the Third Circuit's judgment in this case.

---

coaches, academics, etc. The authors propose that "in raising our athletic daughters, we are raising girls to be strong, self-determined women." J. Zimmerman and G. Reavill, *Raising Our Athletic Daughters* xii (1998).

Respectfully submitted,

LOIS G. WILLIAMS
BRAD E. BIEGON
HOWREY & SIMON
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004

DINA R. LASSOW
LOBEL, NOVINS & LAMONT
1275 K Street, N.W., Suite 770
Washington, D.C. 20005

MARCIA D. GREENBERGER*
**Counsel of Record*
LESLIE T. ANNEXSTEIN
NEENA K. CHAUDHRY
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W., Suite 800
Washington, D.C. 20036
(202) 588-5180

DEBORAH L. BRAKE
UNIVERSITY OF PITTSBURGH
SCHOOL OF LAW
3900 Forbes Ave., Room 322
Pittsburgh, PA 15260

December 8, 1998

Counsel for *Amici Curiae*

APPENDIX
INTEREST OF THE AMICI

The National Women's Law Center ("Center") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of Title IX. In particular, the Center has consistently sought active enforcement of Title IX with respect to intercollegiate athletics and was counsel in the first Title IX challenge to discrimination in intercollegiate athletics, *Haffer v. Temple University*. The benefits and opportunities uniquely available to competitive athletes have been and continue to be disproportionately reserved for men. The Center has a deep and abiding interest in assuring equal athletic opportunity under Title IX, including the opportunity to participate in intercollegiate athletics.

American Association of University Women (AAUW), for well over a century, the organization of 150,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls. AAUW plays a major role in activating advocates nationwide on AAUW's priority issues. Current priorities include gender equity in education, reproductive choice, and workplace and civil rights issues. AAUW believes that Title IX is essential for continuing the advancement of women and girls in education.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU's Women's Rights Project was established in 1971. For nearly three decades, it has battled on behalf of women's equality in schools and other settings. Among other things, the

ACLU has appeared before this Court in virtually every major women's rights case, either as direct counsel or as *amicus curiae*. The issue presented in this case, which involves the proper scope and application of Title IX, is therefore a matter of great concern to the ACLU and its members.

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Sex Discrimination, including sex discrimination in education, Women's Health and Reproductive Rights, Family Law, Violence Against Women and Child Care.

Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education, particularly the issues of discrimination, and access to equal opportunities in athletic programs and activities. The issues raised in this case will have an enormous impact on the rights of women and girls to participate fully in educational and athletic programs free of the terrible consequences of discrimination. Thus, this case raises questions within the expertise and concern of the California Women's Law Center; and the California Women's Law Center has the requisite interest and expertise to be heard by the Court in this appeal.

Center for Women Policy Studies is a national nonprofit, multiethnic and multicultural feminist policy research and advocacy institution. The Center believes Title IX is a critical tool for ensuring educational equity for women and girls in diverse settings; the law's strength and scope of application must not be diluted. For example, the issue of sex bias in the SAT (Scholastic Assessment Test) is a major focus of our work and the Court's ruling will impact on the ability of advocates to address this bias.

Clearinghouse on Women's Issues was established some 25 years ago to provide a channel for dissemination of information

on a variety of issues of special concern to women. Advancement of educational opportunities for women and girls and elimination of discrimination in all areas of society are major issues to which we have given sustained attention. The full implementation and enforcement of Title IX has long been of great concern to our members.

The Connecticut Women's Education and Legal Fund, Inc. (CWEALF) is a statewide non-profit organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was incorporated in 1973 and has over 1,400 members. Having worked on the issue of Title IX since we first opened our doors, we understand how critical this law has been in terms of improving educational equity for girls and women, particularly in the area of athletics. We also understand that it is vital for the authoritative voice of intercollegiate athletics -- the NCAA -- to abide by Title IX if women's sports are to be truly equitable.

Equal Rights Advocates ("ERA") is a San Francisco-based public interest law center dedicated to the empowerment of women and girls through the establishment of their economic, social, and political equality. Since its inception in 1974, ERA has specialized in litigating cases and pursuing public policy initiatives designed to assure women equal access to all of society's benefits including employment, education, and public accommodations. ERA has litigated cases involving Title IX, including *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal 1993), *reconsid, granted*, 949 F.Supp. 1415 (N.D. Cal. 1996), as well as participating as amicus curiae in Title IX cases, such as *Gebser v. Lago Vista*, Indep. Sch. Dist. 118 S. Ct. 1989 (1998).

Since 1899, the *National Association for Girls & Women in Sport (NAGWS)* has championed equal funding, quality and respect for women's sports programs. NAGWS is an organization of over 5,000 professional educators whose mission is to promote and advocate for increased opportunities in

participation and leadership for girls and women in sport.

The National Association of Social Workers (NASW) is a professional membership organization comprised of more than 155,000 social workers with chapters in every state, the District of Columbia, New York City, Puerto Rico and the Virgin Islands, and an international chapter in Europe. Created in 1955 by the merger of seven predecessor social work organizations, the NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. In furtherance of its purposes, the NASW promulgates professional standards and criteria including *Standards for the Practice of Clinical Social Work and Guidelines for Clinical Social Work Supervision*, conducts research, publishes studies of interest to the profession, provides continuing education and enforces the *NASW Code of Ethics*. The NASW also sponsors a voluntary credentialing program to enhance the professional standing of social workers including the NASW Diplomate in Clinical Social Work and the Qualified Clinical Social Worker credentials.

National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities nationwide. Given NCJW's early and active involvement in passage of the Title IX program and NCJW's *National Resolutions*, which support "the enactment and enforcement of laws and regulations which protect civil rights and individual liberties for all," we join this brief.

National Education Association (NEA) is a nationwide labor organization with approximately 2.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to ending gender discrimination by educational institutions and, to this

end, firmly supports the vigorous enforcement of Title IX.

National Partnership for Women & Families, founded in 1971, formerly the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the United States Supreme Court to advance women's opportunities in education.

NAACP Legal Defense and Educational Fund, Inc. (LDF) is a nonprofit organization committed to enforcing legal protections against racial discrimination and securing the constitutional and civil rights of African-Americans. LDF has developed an expertise in civil rights litigation through the many cases in which it has participated. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing Legal Defense Fund as a "firm'... which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation"). LDF historically has had and continues to have a major role in challenging discrimination and segregation in education, representing parties or participating as *amicus curiae* in numerous education cases before the United States Supreme Court. *See, e.g., Bazemore v. Friday*, 478 U.S. 385 (1986); *Swann v. Charlotte-Mecklenberg Bd. Of Educ.*, 402 U.S. 1 (1971); *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 637 (1950).

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders

of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women and girls equal opportunity, including sex discrimination in intercollegiate athletic programs. For years, NOW LDEF has fought for educational equity for girls and the full enforcement of Title IX. NOW LDEF has appeared as *amicus* in numerous cases concerning girls' rights to be free from sex discrimination in education programs under Title IX, and joins this case because of its importance to securing equal opportunity in education.

People for the American Way Foundation (People For) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including efforts to protect the rights of women. People For regularly supports the enactment of civil rights legislation, participates in civil rights litigation, and conducts programs and studies directed at reducing problems of bias, injustice, and discrimination. The instant case is of particular importance in order to vindicate the fundamental principle that civil rights laws like Title IX should apply to all direct and indirect recipients of federal funding in order to fully and effectively achieve the laws' objective of combating discrimination.

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that one of the most fundamental guarantees that women and girls are entitled to under Title IX is equal opportunity, which includes the enjoyment of equal rights and treatment as male athletes. Women Employed believes that women are entitled

to the same rights and opportunities as men, whether their interests lie in sports, arts, or business.

Women's Law Project (WLP) is a non-profit public interest legal center located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP has a strong interest in the eradication of discrimination against women and girls in athletics and the availability of strong and effective remedies under Title IX of the Education Amendments of 1972. The WLP has worked throughout its twenty-four year history to eliminate sex discrimination in athletics and education, representing student athletes, coaches, and other players in the athletic arena in their efforts to achieve equal treatment and equal opportunity. The application of Title IX to the NCAA and to other athletic associations which operate and control the athletic programs of federally funded school programs is essential to the ultimate elimination of gender discriminatory practices in these programs.

The Women's Sports Foundation is a non-profit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and creating and educated public that supports gender equity in sports. The Foundation distributes over $1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and other women's sports related questions, and administers award programs to increase public awareness about the achievements of women in sports. The Foundation is interested in this case because of its important implications for gender equity in sports.

The YWCA of the USA is the oldest women's membership organization in the nation. Founded in 1858, it currently serves over two million girls, women and their families through over 350 YWCAs in 4,000 locations across the country. Strengthened

by diversity, the Association draws together members who strive to create opportunities for women's growth leadership and power in order to attain a common vision: peace, justice, freedom and dignity for all people. The YWCA of the USA supports this brief because it strongly believes in the benefits that sports offer young women, and because of its conviction that young women are equally deserving of opportunities to benefit from athletic activities.

No. 98-84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Petitioner,

v.

R. M. SMITH,

Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

---

BRIEF OF *AMICI CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C., AND SOUTHERN POVERTY LAW CENTER IN SUPPORT OF RESPONDENT

J. Richard Cohen
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104
(334) 264-0286

Adele P. Kimmel
(Counsel of Record)
Arthur H. Bryant
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 797-8600

Counsel for *Amici Curiae*

December 8, 1998

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page:**

Statutes and Regulations:

INTEREST OF *AMICI CURIAE*[1]

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to using trial lawyers' skills and strategies to advance the public good. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance civil rights and civil liberties, environmental protection and safety, consumers' and victims' rights, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless. TLPJ has litigated numerous discrimination in education cases under federal civil rights laws, including Title IX of the Education Amendments Act of 1972 ("Title IX") and Title VI of the Civil Rights Act of 1964 ("Title VI").

Founded in 1971, the Southern Poverty Law Center ("SPLC") has litigated scores of pioneering civil rights cases on behalf of minorities, women, factory workers, poor people in need of health care, mentally ill persons, children in foster care, prisoners facing barbaric conditions of confinement, and many other victims of injustice. SPLC has filed both administrative and federal court complaints under Title VI.

Amici are concerned about the implications of this case beyond the narrow issue of whether the National Collegiate Athletic Association ("NCAA") may be subject to the requirements of Title IX. The NCAA argues that its amenability to suit under Title IX hinges on whether it is a recipient of federal funds. Although Respondent and *amici* disagree with this claim, the

---

[1] Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for either party authored the brief in whole or in part, and no person or entity other than *amici curiae* made any monetary contribution to its preparation or submission.

same factual question arguably governs the NCAA's potential liability under a variety of other civil rights laws. Thus, if the decision below is reversed on the ground that the NCAA is *not* a recipient of federal funds, then the NCAA's accountability could be improperly limited under all of the civil rights statutes prohibiting discrimination in federally funded programs and activities.[2]

TLPJ and SPLC are co-counsel for the plaintiffs in *Cureton v. National Collegiate Athletic Ass'n*, a national race discrimination class action pending in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 97-131, which charges the NCAA with violating Title VI and certain federal agency regulations promulgated thereunder. Specifically, *Cureton* charges that the NCAA's rule for determining whether incoming freshmen may participate in intercollegiate athletics and receive an athletic scholarship discriminates against African-American student-athletes. The NCAA has defended the case on numerous grounds, including that it is not a recipient of federal funds within the meaning of Title VI.

Based on the record developed in *Cureton*, we submit this brief to apprise the Court of an additional basis for affirming the Third Circuit's judgment that the NCAA may be a recipient of federal funds subject to Title IX. Because the district court denied

---

[2] These statutes include Title VI, 42 U.S.C. § 2000d, prohibiting race and national origin discrimination; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibiting disability discrimination; and Section 303 of the Age Discrimination Act of 1975, 42 U.S.C. § 6102, prohibiting age discrimination. Title IX, like the Rehabilitation Act and the Age Discrimination Act, was modeled on Title VI and contains identical language regarding federal funding. This Court has assumed the meaning of the funding language in these statutes to be the same. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 538 (1982); *see also United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605, 610 (1986); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 635-36 (1984).

Respondent's motion for leave to amend her complaint, she did not have an opportunity to develop a record on the possible grounds for holding that the NCAA is a recipient of federal funds subject to Title IX. *Amici* were permitted to develop such a record for their Title VI claim in *Cureton*, compiling evidence of the NCAA's receipt of federal funds from the United States Department of Health and Human Services ("HHS") to operate the National Youth Sports Program ("NYSP"). Indeed, the plaintiffs in *Cureton* submitted sufficient evidence of the NCAA's receipt of federal funds for the NYSP to withstand the NCAA's motion for summary judgment on that issue. *Cureton v. NCAA*, No. Civ. A. 97-131, 1997 WL 634376, at *2 (E.D. Pa. Oct. 9, 1997).[3]

The plaintiff in this case, Renee Smith, specifically argued to the Third Circuit that the NCAA is covered by Title IX because it receives federal funding for the NYSP, but the Third Circuit's ruling was not based on this ground. This Court may nevertheless consider any ground that would support the Third Circuit's judgment and affirm on an alternative basis. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("this Court reviews judgments, not opinions").[4] We therefore urge the Court to consider the NCAA's receipt of federal funds from HHS as an alternative ground for affirming the Third Circuit's judgment.

---

[3] Portions of the record developed in *Cureton* have been included in materials that *amici* have lodged with the Court for its convenience ("Lodged Materials").

[4] This Court repeatedly has held that the prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). In any event, the Court has inherent authority to consider issues that were not presented in a petition for *certiorari* and not raised in the courts below. *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980); *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970).

STATEMENT OF THE CASE

This case arises out of Respondent Renee M. Smith's effort to hold the NCAA accountable for discriminating against her on the basis of her sex, in violation of Title IX, 20 U.S.C. §§ 1681 *et seq.* *See* Pet. App. 1a-2a, 3a-4a.[5] Specifically, Smith alleges that the NCAA violated Title IX by granting a disproportionate number of waivers of its athletic eligibility rules to male student-athletes. *Id.* 29a. The NCAA moved to dismiss this claim, arguing that Smith had failed to allege that the NCAA is a recipient of federal funds and that, in any event, she could not establish that the NCAA receives any federal aid that would trigger Title IX coverage. *See id.* 29a. The district court granted the NCAA's motion and dismissed Smith's *pro se* complaint for failure to state a claim upon which relief could be granted. *Id.* 33a.

Shortly after the district court dismissed Smith's Title IX claim, Smith sought leave to amend her complaint to allege that "[t]he NCAA is a recipient of federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." *Id.* 18a (quoting proposed amended complaint). The district court denied Smith's motion, stating only that the motion "is denied as moot, the court having granted defendant's motion to dismiss . . . ." *Id.* 36a.

Smith filed an appeal in the Third Circuit. She argued that the district court should have permitted her to amend her complaint because "the NCAA directly and indirectly receives federal funding, which makes the [NCAA] a 'recipient' of federal aid and subject to Title IX scrutiny." Smith Brief at 9. Smith further contended that "[t]he NCAA's National Youth Sports Program receives direct federal funding." *Id.* at 22.[6]

---

[5] The Appendix to the Petition for *Certiorari* is cited as "Pet. App. ___."

[6] This argument was also raised in the Brief of *Amici Curiae* National

The Third Circuit reinstated Smith's Title IX claim, holding that the district court erred in denying her motion for leave to amend. *Id.* 17a, 20a. According to the Court of Appeals, Smith's proposed amended complaint would not have been futile because Smith alleged facts "which, if proven, would establish that the NCAA was a recipient of federal funds within the meaning of Title IX." *Id.* 18a. Focusing on Smith's proposed allegation that "[t]he NCAA is a recipient of federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance," the Court of Appeals held that "this allegation would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss." *Id.* 18a-19a. The Third Circuit further noted that the district court would have to address the merits of Smith's claim on remand "if Smith can prove her allegations to support the applicability of Title IX to the NCAA." *Id.* 19a n.9.

In holding that the NCAA may be subject to Title IX, the Third Circuit emphasized two aspects of the NCAA's relationship with its member colleges and universities: (1) the NCAA is an organization created by and comprised of federally funded educational institutions which acts as their "surrogate" with respect to athletic rules; and (2) the NCAA receives annual dues from its federally funded member institutions. *Id.* 15a, 16a, 19a. The Third Circuit did not rule on an additional ground presented to support the applicability of Title IX to the NCAA – that the NCAA receives federal funding from HHS to operate an education program known as the NYSP. As we now explain, evidence from the *Cureton* lawsuit that is currently being prosecuted by *amici* demonstrates that the NCAA receives federal funding through HHS, and thus is subject to suit under the full

---

Women's Law Center *et al.*, filed in support of Smith in the Third Circuit, at 5 n.3.

panoply of civil rights laws prohibiting discrimination in federally funded programs, including Title IX.

SUMMARY OF ARGUMENT

The issue in this case is whether Renee Smith's proposed amended complaint is sufficient to state a Title IX claim against the NCAA. Although Smith's original *pro se* complaint did not allege that the NCAA was a recipient of federal aid, her amended complaint alleged that "[t]he NCAA is a recipient of federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." Pet. App. 18a (quoting proposed amended complaint).

The Third Circuit correctly held that Smith's proposed amendment would not have been futile and that the district court erred in denying her motion for leave to amend. In ruling that the NCAA may be subject to Title IX, the Third Circuit focused on the NCAA's relationship with its federally funded member institutions. *Id.* 15a, 16a, 19a. *Amici* believe that the Third Circuit's grounds for reinstating Smith's Title IX claim support affirmance. But the Court should also be aware that there is an alternative basis for affirming the Third Circuit's judgment that Smith alleged facts "which, if proven, would establish that the NCAA was a recipient of federal funds within the meaning of Title IX." *Id.* 18a. Regardless of whether the NCAA is subject to Title IX because of its relationship with its federally funded member institutions, it is nevertheless covered by the statute because of its receipt of a grant from HHS.

The record developed by *amici* in *Cureton*, their Title VI suit against the NCAA, shows that the NCAA has been receiving a grant from HHS since 1969 to operate the NYSP. The NCAA was a direct recipient and the named grantee of those funds for at least 22 years, from 1969 through 1991. Since 1992, the National

Youth Sports Program Fund (the "Fund"), an NCAA affiliate, has been the nominal recipient of the NYSP grant. The sworn testimony of an NCAA official confirms that the NCAA created the Fund to receive the NYSP grant solely to evade coverage under the civil rights statutes prohibiting discrimination in federally funded programs. But, as *amici's* efforts in *Cureton* make clear, the Fund cannot insulate the NCAA from liability under the federal civil rights laws.

The record in *Cureton* demonstrates that the Fund is a mere conduit through which the NCAA receives federal aid to operate the NYSP. Indeed, the NCAA wields complete control over the Fund and the NYSP grant. For example, the Fund's board of directors is comprised solely of high level NCAA employees and the chair of the NCAA's NYSP Committee; the Fund has no offices, employees, or letterhead; the NCAA's NYSP Committee, not the Fund, runs the NYSP and has final authority over all decisions involving participation in the program and distribution of the federal grant; and the federal grant is disbursed through a bank account in the NCAA's name, not the Fund's. In addition, HHS itself views the NCAA as the recipient of the NYSP grant, notwithstanding that the Fund is the nominal grantee.

The Fund's status as a mere conduit for the NYSP grant renders the NCAA amenable to suit under Title IX. This is true whether the NCAA is viewed as a direct or an indirect recipient of federal funds. The NCAA's effective control over the Fund and the operation of the NYSP support piercing the Fund's corporate veil, thereby making the NCAA a direct recipient of the federal grant. Alternatively, the NCAA's relationship with the Fund, at a minimum, makes the NCAA an indirect recipient of the federal grant. Under either alternative, the NCAA is a recipient of federal financial assistance within the meaning of Title IX – and is prohibited by that statute from discriminating against Renee Smith on the basis of her sex.

ARGUMENT

THE DECISION TO REINSTATE SMITH'S TITLE IX CLAIM SHOULD BE UPHELD AS THERE IS AN ALTERNATIVE GROUND FOR RULING THAT THE NCAA MAY BE A RECIPIENT OF FEDERAL FUNDS WITHIN THE MEANING OF TITLE IX.

Title IX prohibits discrimination against persons on the basis of sex "under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). As a threshold matter, it is well settled that Title IX covers both direct and indirect recipients of federal funds. *Grove City College v. Bell*, 465 U.S. 555, 564, 569-70 (1984) (holding that indirect recipients of federal aid, such as colleges whose students receive federal financial assistance, are covered by Title IX). Indeed, HHS's regulatory definition of a "recipient" demonstrates that there is no meaningful distinction between direct and indirect recipients for purposes of triggering Title IX coverage:

> *Recipient* means . . . any public or private agency, institution, or organization, or other entity . . . to whom Federal financial assistance is extended, *directly or through another recipient*, and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assign, or transferee thereof.

45 C.F.R. § 86.2 (h) (emphasis added).

As we now explain, the record developed by *amici* in *Cureton* demonstrates that the relationship between the NCAA and the Fund makes the NCAA a "recipient" of federal financial assistance within the meaning of Title IX. At a minimum, the NCAA's effective control over the Fund makes the NCAA an indirect recipient of the NYSP grant from HHS. But there is also

ample evidence to support piercing the Fund's corporate veil. The NCAA would then be a direct recipient of the NYSP grant, even though the Fund is now the nominal grantee. Under either perspective, there can be no question that the NCAA is amenable to suit under Title IX and the other civil right statutes with comparable funding provisions. *See supra* note 2, at 2.

I. The Record in *Cureton* Demonstrates that the Fund is a Mere Conduit Through Which the NCAA Receives Federal Aid to Operate the NYSP.

Amici's efforts in *Cureton* make clear that the NCAA was a direct recipient and the named grantee of federal aid from HHS for at least 22 years. In response to discovery propounded in *Cureton*, the NCAA admitted that it was "a recipient or grantee of federal funds for the NYSP" from 1969 through 1991.[7] The NYSP is an enrichment program for economically disadvantaged youths that provides summer education and sports instruction on the campuses of NCAA member and non-member institutions of higher education.[8]

Since 1992, the NCAA has been receiving federal funds to operate the NYSP through the Fund, a non-profit corporation created by the NCAA.[9] But the fact that the NCAA is no longer the named grantee of federal funds for the NYSP does not insulate it from Title IX's expansive reach.

---

[7] Lodged Materials, Ex. A (Defendant's Objections and Responses to Plaintiffs' Interrogatories and Requests for Admissions and Production of Documents (Set II)) at 3-20.

[8] *See* Lodged Materials, Ex. B ("Guidelines for the 1993 National Youth Sports Program") at NCAA 009886; Ex. C (1996 Press Release on NYSP issued by HHS's Office of Community Services).

[9] *See* Lodged Materials, Ex. A at 21-26; Ex. D ("Articles of Incorporation of a General Not for Profit Corporation").

Title IX broadly defines a "program or activity" to include "all of the operations" of an educational entity, "any part of which is extended Federal financial assistance." 20 U.S.C. § 1687.[10] Prior to the passage of the Civil Rights Restoration Act of 1987 ("CRRA"), Pub. L. No. 100-259, 102 Stat. 28 (1988), this Court had limited Title IX's coverage to the specific programs or sub-parts of the entity that received federal funds. *Grove City*, 465 U.S. at 570-74. But the CRRA eliminated this program-specific construction in favor of far more expansive coverage.

The NCAA incorporated the Fund just one year after Congress reaffirmed the broad coverage of Title IX and similar civil rights statutes by passing the CRRA.[11] The NCAA created the Fund to serve as the named grantee for the HHS-funded NYSP in an effort to distance itself from the expansive reach of federal civil rights laws like Title IX. As Frank Marshall, the NCAA's Group Executive Director for Finance and Business Services, and an officer and director of the Fund, testified in his *Cureton* deposition:

> Over time the NCAA has wanted to insure that it is not a recipient or a contractor of the federal government and has tried to manage the NYSP program in accordance with that. The NYSP fund I believe was created to be the grant recipient related to the NYSP grant to help insure that distinction.

Lodged Materials, Ex. E (Deposition of Frank Marshall) at 31-32.

The discovery in *Cureton* reveals, however, that the Fund is merely a conduit through which the NCAA receives federal aid to

[10] It is beyond dispute that intercollegiate athletics is an educational program or activity under Title IX. *See, e.g.*, 34 C.F.R. § 106.41; *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

[11] *See* Lodged Materials, Ex. D.

operate the NYSP. That being so, the Fund cannot insulate the NCAA from liability under the federal civil rights laws.

A. The NCAA Wields Complete Control Over the Fund and the NYSP Grant.

Although the NCAA created the Fund to serve as the grant recipient for the NYSP, the NCAA itself continues to make all decisions regarding the NYSP's operation and use of the federal grant from HHS. In addition, even though the Fund nominally controls the NYSP, the NCAA itself controls the Fund: pursuant to the Fund's bylaws, three of the Fund's four directors are high level NCAA officers or employees (including the NCAA's Executive Director), and the fourth director is the Chairperson of the NCAA's NYSP Committee.[12] Moreover, according to Edward A. Thiebe, the NCAA's Director of Youth Programs, the NCAA's NYSP Committee runs the NYSP. Lodged Materials, Ex. H (Deposition of Edward A. Thiebe) at 16-17, 58, 60, 79.

The NCAA's NYSP Committee has final approval over which colleges and universities may participate in the NYSP as subgrantees (*id.* at 58, 79), and over which schools are in good standing and may continue to participate in the program. *Id.* at 58, 60. In addition, the NCAA has stipulated that actions taken by its NYSP Committee are final actions with respect to the NYSP in that no further action or authorization is required by the Fund or the NCAA to implement the committee's decisions. *Id.* at 96-97.

[12] Lodged Materials, Ex. F ("Bylaws of the National Youth Sports Program Fund") at 1-2; *see also* Lodged Materials, Ex. G (Excerpts from "1995-96 NCAA Annual Reports") at 51. The NCAA's control over the Fund is also evidenced by the Fund's Articles of Incorporation, which provide that all of the Fund's assets will be distributed exclusively to the NCAA upon the Fund's dissolution. Lodged Materials, Ex. D at 3, ¶ 8.

The fact that the NCAA – rather than the Fund – operates the NYSP is further confirmed by an agreement between the NCAA and the Fund in which the NCAA acknowledged that it had been performing the administrative services needed to operate the NYSP for many years and agreed to continue doing so, provided that the Fund paid the NCAA annual consideration of one dollar.[13] Moreover, as part of its "administrative" responsibilities for the NYSP, the NCAA handles the receipt and disbursement of the federal grant money through an account that it opened at United Missouri Bank.[14] The bank account is not in the Fund's name; rather, the account's title is "The National Collegiate Athletic Association – The National Youth Sports Program."[15]

The Fund's failure to observe standard corporate formalities provides further evidence of the NCAA's control over the Fund and the federal aid provided for the NYSP. The Fund has no offices, no employees, and no letterhead. Lodged Materials, Ex. E at 13, 42; Ex. H at 44. In addition, the Fund has never held a board of directors meeting. Lodged Materials, Ex. E at 76. Nor has it performed anything other than ministerial functions since its inception. *Id.* at 73-74. In short, the NCAA exerts complete control over the Fund and the operation of the NYSP.

B. The Conduct of Both HHS and the NCAA Regarding the NYSP Demonstrates that the NCAA is a Covered "Recipient" under Title IX.

Although the Fund has been the nominal recipient of the NYSP grant since 1992, the conduct of both HHS and the NCAA since

---

[13] Lodged Materials, Ex. I ("Agreement") at 1, 2.

[14] *Id.* at 69-70.

[15] Lodged Materials, Ex. J (Letter from David A. Bruton to Danielle Banks dated September 5, 1997) at 2.

that time demonstrates that the Fund is an artifice through which the NCAA continues to receive the federal aid. For example, in response to a complaint lodged with HHS alleging that the NCAA discriminated on the basis of sex in its intercollegiate championship tournaments, HHS wrote as follows:

> The NCAA . . . is a recipient of Federal financial assistance through a Community Services Block Grant from this Department. Therefore, we have accepted and will investigate your complaint under the authorities of the OBRA [Omnibus Budget Reconciliation Act of 1981] Community Services block grant provisions, which prohibit discrimination on the basis of sex, and Title IX.

Letter from HHS to Title IX complainant dated November 4, 1994.[16] Similarly, when HHS completed its investigation of that complaint, it stated:

> The investigation was conducted under Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681, 45 C.F.R. Part 86; and the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35). Because HHS funds were involved, NCAA is subject to the nondiscrimination provisions of the above-referenced Acts and regulations.

Letter from HHS to Title IX complainant dated March 10,1998.[17]

HHS's references to the "grant" received by the NCAA relate to the NYSP. HHS provides federal assistance for the NYSP through the Community Services Block Grant provisions of the

---

[16] *See* Lodged Materials, Ex. K at 1.

[17] *See* Lodged Materials, Ex. L at 1.

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 42 U.S.C. § 9910c, *as amended by* § 205, Pub. L. No. 103-252, 108 Stat. 623 (1994). The dates of the HHS letters quoted above are significant because both were written after the NCAA began receiving aid for the NYSP through the Fund. Apparently, the fact that the NCAA is no longer the named grantee is of no import to HHS. HHS continues to treat the NCAA as a covered recipient under Title IX.

The NCAA's application for HHS funds in 1993 is further evidence of the artificial distinction between the NCAA and the Fund. Notwithstanding that the Fund became the nominal grant recipient in 1992, the NCAA prepared and submitted form guidelines ("Guidelines") in 1993 which identified the NCAA – not the Fund – as the grantee. Lodged Materials, Ex. B at NCAA 009890; Ex. H at 29-31. The Guidelines also described the NCAA's responsibilities for the program as follows:

> NCAA program direction and control, including institution selection, approval of proposed projects, responsibility for project detail and execution by participating institutions.

Lodged Materials, Ex. B at NCAA 009890. Similarly, the Guidelines described the program's resources and funding as follows:

> The NCAA has been awarded a grant by the OCS [United States Department of Health and Human Services, Administration for Children and Families, Office of Community Services] and will award subgrants to designated institutions whose budgets have been approved by the NYSP Committee in accordance with these guidelines.

Id.

Finally, a press release issued by HHS in 1996 is yet another indicia of the artificial distinction between the NCAA and the Fund. In that press release, HHS identifies the NCAA as the recipient of the annual grant to operate the NYSP:

> An annual grant is made to a national, non-profit organization to operate the National Youth Sports Program (NYSP). . . . *In FY [Fiscal Year] 1996, $11,520,00 was awarded to the NCAA* which contracts with some 173 colleges and universities in 44 States to provide sports instruction and enrichment activities to disadvantaged youngsters from ages 10 to 16 for a summer program.

Lodged Materials, Ex. C (emphasis added). Although the press release was issued four years after the Fund became the named grantee, HHS nonetheless continued to regard the NCAA as the entity that receives the grant and operates the program.

In short, the NCAA's role in administering the NYSP remained essentially unchanged after the Fund became the named grant recipient in 1992. The NCAA continues to perform the same functions and services for the NYSP that it performed when it was the named grantee, and the NCAA's NYSP Committee still has final decisionmaking authority over the program's operations and the distribution of the HHS grant to participating institutions. Indeed, just last year, the NCAA's Executive Director described the NYSP as "one of the NCAA's best kept secrets" and characterized the program as the NCAA's "partnership with the federal government."[18] Accordingly, the Fund is nothing more than an artifice through which the NCAA receives federal financial assistance.

---

[18] Lodged Materials, Ex. M (NYSP Annual Report) at NCAA 001438.

II. The Fund's Status as a Mere Conduit for Federal Aid Renders the NCAA Amenable to Suit under Title IX.

A. The NCAA is a Direct Recipient of the NYSP Grant Because the Fund is Nothing More than the NCAA's "Alter Ego."

The fact that the Fund is a mere conduit for federal aid means that the NCAA is, in reality, a direct recipient of federal financial assistance within the meaning of Title IX and all similar civil rights laws. It is well settled that a court may disregard the corporate form to prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy. *See, e.g., First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629, 630 (1983); *Publicker Industries, Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir. 1979).

When deciding whether to apply the "alter ego" theory and disregard the corporate entity, courts consider various factors including, *inter alia*, whether the corporation has failed to observe corporate formalities, how the corporation operates and the defendant's relationship to that operation, and whether the corporate form is being used to defeat legislative policies. *See First Nat'l City Bank*, 462 U.S. at 630 (corporate form will not be recognized when interposed to defeat legislative policies); *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981) (factors include failure to observe corporate formalities); *DeWitt Truck Brokers, Inc. v. W. Ray Fleming Fruit Co.*, 540 F.2d 681, 685, 686 (4th Cir. 1976) (factors include failure to observe corporate formalities, and how corporation operates and defendant's relationship to operation).

Three main factors described above warrant piercing the Fund's corporate veil and treating the NCAA as a direct recipient of the NYSP grant: (1) the degree of control that the NCAA wields over the Fund; (2) the Fund's failure to observe corporate formalities; and (3) the NCAA's creation of the Fund to evade coverage under federal civil rights laws like Title IX. All of these factors compel a finding that the NCAA is, in reality, a direct recipient of federal financial assistance within the meaning of Title IX.

B. At a Minimum, the NCAA Indirectly Receives the NYSP Grant Through the Fund.

Regardless of whether the factors described above are sufficient to warrant piercing the Fund's corporate veil, they nevertheless compel a finding that the NCAA indirectly receives the NYSP grant through the Fund. The record developed in *Cureton* demonstrates that the NCAA effectively controls and operates the Fund. The record in *Cureton* also shows that the NCAA created the Fund to receive the NYSP grant solely to avoid coverage under the civil rights laws prohibiting discrimination in federally funded programs. Thus, even though the Fund is the named recipient of the NYSP grant, it is merely a conduit through which the NCAA receives the grant. At a minimum, the NCAA is therefore an indirect recipient of federal aid – a fact which, standing alone, is sufficient to render it amenable to suit under Title IX. *See Grove City*, 465 U.S. at 564, 569-70 (indirect recipients of federal financial assistance are covered by Title IX).

In addition, Title IX's expansive definition of a "program or activity" compels a finding that the NCAA indirectly receives the NYSP grant through the Fund. As set forth above, Title IX defines a "program or activity" to include "all of the operations" of a covered entity, "any part of which is extended Federal financial assistance." 20 U.S.C. § 1687.

Under the plain terms of the statute, the NCAA is unquestionably a covered "program or activity." The NCAA fits well within two parts of Title IX's definition. First, it satisfies the requirements of subsection (3)(A)(ii) of the statute because the NCAA is a "private organization" which is "principally engaged in the business of providing education." *Id.* § 1687(3)(A)(ii). Second, it satisfies the requirements of subsection (4) because it is an entity established by two or more federally funded colleges or universities. *Id.* § 1687(4).[19] This means that *all* of the NCAA's operations are covered by Title IX, if *any part* receives federal financial assistance. The record in *Cureton* shows that the Fund is a "part" of the NCAA's "operations," and that the Fund receives federal financial assistance from HHS for the NYSP. As such, the NCAA indirectly receives federal aid through the Fund and is therefore covered by Title IX.

In short, the record in *Cureton* supports affirmance of the Third Circuit's judgment that Smith is entitled to amend her complaint to allege that the NCAA is a recipient of federal funds within the meaning of Title IX. The *Cureton* discovery makes clear that Smith will be able to support her allegation that the NCAA receives federal financial assistance. Smith's proposed amended complaint alleges that "[t]he NCAA is a recipient of federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." Pet. App. 18a (quoting proposed amended complaint). Either the Fund is the NCAA's "alter ego" through which the NCAA directly receives the NYSP grant, or the Fund is an affiliate through which the NCAA indirectly receives the NYSP grant. Smith's proposed amendment entitles her to an opportunity to develop a record supporting either scenario.

---

[19] The district court in *Cureton* held that the NCAA was a "program or activity" covered by Title VI under subsection (4) of that statute, which is identical to the corresponding subsection in Title IX. *Cureton*, 1997 WL 634376, at *2.

CONCLUSION

For these reasons, we urge this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

Adele P. Kimmel
(Counsel of Record)
Arthur H. Bryant
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 797-8600

Counsel for *Amicus Curiae*
Trial Lawyers for Public Justice, P.C.

J. Richard Cohen
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104
(334) 264-0286

Counsel for *Amicus Curiae*
Southern Poverty Law Center

December 8, 1998

(8)

No. 98-84

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R.M. SMITH,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE MICHAEL BOWERS, CHAD GANDEN, JUSTIN RAZZANO, THE CENTER FOR SCHOOL CHANGE AND THE AUTISM NATIONAL COMMITTEE IN SUPPORT OF RESPONDENT

Barbara E. Ransom, Esquire*
Max Lapertosa, Esquire
125 South 9th Street, Suite 700
Philadelphia, Pennsylvania 19107
(215) 627-7100

Counsel for Amici Curiae

December 8, 1998

* Counsel of Record

39pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page**

No. 98-84

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R.M. SMITH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE MICHAEL BOWERS, CHAD GANDEN, JUSTIN RAZZANO, THE CENTER FOR SCHOOL CHANGE AND THE AUTISM NATIONAL COMMITTEE IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE[1]

Michael Bowers is a student currently enrolled at Temple University. In the second grade, he was identified as perceptually impaired, the terminology the New Jersey Department of Education uses to identify students with a learning disability. Michael qualified academically for admission to an National Collegiate Athletic Association ("NCAA") member college or university, and several recruited him heavily for their athletic programs. Michael applied and was admitted to Temple University as a regular admission student solely on the basis of his high school academic record. However, the NCAA deemed him ineligible to participate in intercollegiate athletics, practice with any intercollegiate athletes, or receive any athletic scholarship assistance. No member college or university could or would allow him to participate in its athletic program.

Chad Ganden is a student at Michigan State University. Chad was tested for his disability in 1985. In second grade in the West Bloomfield School District in Michigan, the School Psychologist determined that Chad needed special education services. Despite his disability, Chad continued his mainstream education, which his individual

[1] No Counsel for a party authored this brief in whole or in part. No person or entity other than the amici curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

education program team supplemented with special education programs designed to address his disability.

Justin Razzano is a student with a learning disability who attended Immaculata High School and then transferred to Somerville High School in New Jersey. Justin's honors include Who's Who Among American High School Students, Boy Scout of the Year and the Most Valuable Player Award in football and basketball. Justin is described by his teachers as a very friendly, outgoing, energetic young man who is well liked and respected by his peers and teachers.

However, Justin's learning disability impacted his academic performance. He applied for initial eligibility from the NCAA Clearinghouse but was denied the opportunity to participate in intercollegiate athletics or receive an athletic scholarship. He was accepted at St. Peter's College in New Jersey.

These individual Amici are student athletes who qualify as persons with a disability within the meaning of Section 504 of the Rehabilitation Act, 29 U.S.C. § 706(8)(B). All three applied to NCAA member colleges and universities and were denied eligibility because the NCAA Clearinghouse refused to certify any special education courses regardless of their content and refused to acknowledge that the students were entitled to any accommodations under federal or state anti-discrimination laws. Resultantly, the students could not participate in

intercollegiate sports and receive athletic scholarships. Amici students join with the other Amici asking this Court to affirm that the NCAA is covered under federal anti-discrimination laws enacted pursuant to Congress' spending power.

The Center for School Change at the University of Minnesota's Humphrey Institute strongly encourages the United States Supreme Court to find that the NCAA is covered by federal anti-discrimination legislation. Educators, parents and legislators nation wide have asked the Center for School Change for help in improving the nation's public schools. But the NCAA has made the process of improving schools more difficult. The NCAA has placed astonishing standards on high schools. For example, the NCAA says it will not accept for purposes of college preparation any special studies course that spends more than 25% of its time studying current issues or law! Many high schools around the nation are asking "who is the NCAA to pass judgment over our curriculum?"

Recently the Center worked with leading school reform authorities throughout the United States in preparing an "open letter" about problems the NCAA is producing in school reform. Four recent national Teachers of the Year joined educators from across the political spectrum who challenged the NCAA because it is frustrating high school reformers by rejecting research-based courses which have been approved by teachers, administrators, local and state authorities. *Educators*

Cry Foul on NCAA's High School Rules, USA TODAY, Jan. 9, 1998, at 1D.

The NCAA has made it difficult for a number of charter school students to be accepted into universities unless the schools conform to the traditional curriculum. Charters are being created so that students achieve higher academic skills and knowledge - but they should not be held to the NCAA's extremely traditional course standards.

The Autism National Committee is a nationwide organization comprised of approximately 1,000 people with autism, their family members, and nationally-recognized professionals in the field of autism. The Committee's mission is to eradicate illegal discrimination against and unnecessary segregation of people with autism. The Committee also works with universities and governmental agencies to promote research into promising educational and treatment practices for people with autism. Finally, the Committee works to broaden the communication skills and self-advocacy of people with autism, and to increase the role people with autism play in determining their own lives.

INTRODUCTION

This matter is before the Court following a motion to dismiss in the Western District of Pennsylvania from what was unarguably a poorly-drafted complaint by a law student seeking

relief from the discriminatory practices of the largest, most powerful association with responsibility for amateur athletics in the United States. The NCAA, undeniably the only game in town for student athletes who want to compete at the college level, is the collection of 1,200 private and public colleges that determine the policies and procedures for intercollegiate athletics in the country. This association of colleges comes to this Court seeking to extricate its members from any responsibility to the young people who participate in their athletic programs to operate such programs in a manner that does not offend the federal anti-discrimination laws that Congress enacted pursuant to its spending powers, specifically Title IX, 20 U.S.C. §§ 1681-1687, Section 504, 29 U.S.C. § 794(a), and Title VI, 42 U.S.C. § 2000d.

In examining whether the NCAA is subject to federal anti-discrimination laws enacted pursuant to Congress' spending power, one must parse the nature and function of the NCAA. In its brief, the NCAA describes itself as a "voluntary, unincorporated association with some 1,200 members, consisting primarily of public and independent colleges and universities across the county, as well as certain athletic conferences, associations, and other education institutions." Pet. Brf. at 4; *see National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 182 (1988) (NCAA includes "virtually all public and private universities and 4-year colleges

conducting major athletic programs in the United States"). The NCAA is irrefutably the only game in town for student athletes, male and female, with and without intellectual and/or physical limitations, of all ethnic groups, to participate in intercollegiate athletics in this country.

This reality is not by happenstance, but rather is the cumulation of well-considered and well-orchestrated plans. The NCAA determined with panache, coercion and the muscle of its Committee on Infractions to install itself as the arbiter of intercollegiate athletics throughout this nation.

SUMMARY OF THE ARGUMENT

The Third Circuit reasoned that the parties had not briefed the merits of Respondent's claim that Title IX applied to the NCAA, but rather held that the District Court abused its discretion in not allowing Ms. Smith to amend her complaint. *R. M. Smith v. National Collegiate Athletic Ass'n*, 139 F.3d 180, 190 (3d Cir. 1998). That this matter is before this Tribunal with so sparse a record is surprising.

Clearly, the NCAA is an "entity which is established by two or more [colleges or universities]" as defined by Title IX, 20 U.S.C. § 1687, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(b), and Title VI, 42 U.S.C. § 2000d-4a(4). Amici support the NCAA's argument that it is an extension of its member colleges and universities and move that argument to

an examination of the associational nature of the NCAA. Amici argue that the NCAA is its member colleges and universities, and conversely that the member colleges and universities are the NCAA. Amici also concur with the NCAA that the member colleges and universities receive federal financial funds and therefore are covered entities within the meaning of the federal anti discrimination statutes enacted pursuant to the Spending Powers Clause.

An analysis of the legislative history of the Civil Rights Restoration Act of 1987 (CRRA), Pub. L. No. 100-259, 102 Stat. 28 (1988), and the federal laws that the Act sought to reinforce, specifically Title IX, Section 504 and Title VI, clearly indicate that the Congress intended that these laws apply to all of the programs and activities connected with the nation's colleges and universities. Any attempt by the NCAA to escape the jurisdiction of these statutes is unconscionable and inconsistent with our system of jurisprudence.

Amici are concerned that the sweep of Petitioner's brief is so broad that a decision in its favor by this Court would impact negatively on persons with disabilities. Although the instant case was brought pursuant to Title IX, Petitioner's argument is infused with a petition to this Court to further limit Congress' intent under Section 504 to ensure that persons with disabilities are fully included in all aspects of the society.

ARGUMENT

I. THE NCAA IS AN EXTENSION OF ITS MEMBER COLLEGES AND UNIVERSITIES WHEN THE ISSUE TO BE DETERMINED IS WHETHER IT RECEIVES FEDERAL FINANCIAL ASSISTANCE.

The NCAA is an unincorporated association of approximately 1200 colleges and universities. Virtually all universities and four-year colleges conducting major athletic programs in the United States are members of the NCAA.[2]

The association is composed principally of public and private colleges and universities, many of which undeniably trigger coverage under Title IX, Section 504 of the Rehabilitation Act and Title VI, all statutes enacted pursuant to the Congress' spending powers. Pet. Brf. at 3. Petitioner

---

2 The formation of the NCAA was traced to one particular problem -- the need for rules to curb violence in intercollegiate football at the commencement of this century. Thus, in its beginning the NCAA's stated objective was to maintain college activities 'on an ethical plane in keeping the dignity and high purposes of education.' The growth of the NCAA beyond its primary work of salvaging football and structuring a formal organization has, indeed, been spectacular. From its humble beginnings and rule-making pertaining to one sport, the organization, and its responsibilities, continued to grow and, in 1973, it was organizationally and procedurally revised. Currently, some of its more important organizational purposes are in the area 1) enforcement, 2) championships, 3) education, 4) broadcasting, 5) rule-making and 6) faculty control and eligibility standards.

National Collegiate Realty Corp. and the NCAA v. Board of County Commissioners of Johnson County, Kansas, 236 Kan. 394, 396, 690 P.2d 1366, 1369 (1984).

NCAA's argument is predicated on the proposition that its associational status somehow distinguishes it and distances it from the obligations and liabilities of its member institutions that the NCAA does not deny are bound to uphold the federal anti discrimination laws enacted pursuant to the Spending Powers Clause.

The NCAA argues that member institutions, as a matter of law, may avoid responsibility for discriminatory behavior if they form an association and individually claim to be bound by its rules, while jointly (in the guise of the association) paying homage to the notion of "member institution control." This argument not only contravenes the language of the statutes, but is fundamentally at odds with established common law agency principles. The NCAA attains no protected status by virtue of its being an unincorporated association. "An association has no legal entity separate and apart from the members of which it is composed." *Kansas Private Club Ass'n and Wyandotte Club Ass'n v. Landerholm*, 196 Kan 1, 2, 408 P.2d 891, 892 (1965).

Under the common law, the NCAA as an association has no greater legal status than a "joint venture" of its membership, virtually every college and university in the United States. "[T]he general rule is that unincorporated associations have no such legal existence as will permit them to acquire and hold property in the associate name either by purchase or gift, and that property ostensibly held by such unincorporated bodies is

deemed to belong to the members jointly or as tenants in common." *Murray v. Sevier*, 156 F.R.D. 235, 244 (D. Kan. 1994), *citing* 6 Am. Jur. 2d Associations and Clubs §§ 1, 23 (1963).[3]

As an association, the NCAA is "not a legal entity separate and distinct from the persons who comprise its membership" which "derives its existence 'from the consensual agreement of the component members, who act not by a distinct entity but by virtue of mere agency'." *Bango v. Ward*, 12 N.J. 415, 421, 97 A.2d 147, 149 (1953)(Brennan, J.), *quoting Harker v. McKissock*, 12 N.J. 310, 96 A.2d 660; *Murray*, 156 F.R.D. at 244-245, *citing* 7 C.J.S. Associations §§ 2-3, 35, 26 (1980)(an "association", unlike a corporation, is merely a creature of contract, not a legal entity distinct from its component members).[4]

---

[3] To avoid the conflict with the common law as applied in matters related to the ownership of property, the NCAA, with the consent of its member colleges and universities, created and incorporated the National Collegiate Realty Corporation, a Kansas "for profit" corporation wholly owned by the NCAA, on June 25, 1970, to "hold title to property, collect income therefor, and turn over the entire amount thereof, less expenses, to the National Collegiate Athletic Association." *National Collegiate Realty Corp.*, 236 Kan. at 396, 690 P.2d at 1369.

[4] There is no dispute that the common law of associations applies to the NCAA for matters related to business. It is further clear from the actions of the members, creating the Realty Corporation giving it the power to hold property, that the NCAA understands and applies the common law in its business dealings. It would be inconsistent to propose a different standard when dealing with matters affecting the civil rights of students attending this nation's colleges and universities.

A. THE NCAA IS A MERE SURROGATE OF ITS MEMBER INSTITUTIONS, THE PUBLIC AND PRIVATE COLLEGES AND UNIVERSITIES OF THIS COUNTRY THAT INDISPUTABLY RECEIVE FEDERAL FINANCIAL ASSISTANCE.

The NCAA is its member institutions. Conversely, the member institutions are the NCAA. "As an unincorporated association, the NCAA is simply a collection of individual members." *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 461 (1980). The member colleges and universities, as the collective membership, affect the policies and operating procedures and use the Association to speak with one voice. *Tarkanian*, 488 U.S. at 193.

The member institutions of the NCAA pay dues to the organization from federal funds that are meant to benefit the colleges and universities that are the recipients.[5] *Grove City College v. Bell*, 465 U.S. 555, 564 (1984) held that where a college receives federal funds in the form of student financial

[5] NCAA members pay annual dues to the Association, $1,800 for Division I members and $900 for Division II members. The Association in turn acts as a clearinghouse to divide proceeds received from sponsored activities. In 1980, the members divided the television football revenues so that Division I members received $27,842,185 (89.9%); Division II members received $625,195 (2%); Division III members received $385,195 (1.3%); and, the Association received $2,147,425 (6.9%). *National Collegiate Athletic Association v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 n. 10 (1984)(hereinafter *Board of Regents*).

aid, such funds benefit the college, obliterating any distinction between direct and indirect recipients of federal funds.[6]

The growth and influence of the NCAA since 1973 when the member colleges and universities revised the Association has been phenomenal, and every step of this growth has been accomplished with the advice and consent of the members. The presidents of the member colleges and universities are required to sign assurances affirming that their respective institutions are in compliance with the Association's Bylaws[7] that they have drafted. Don Yaeger, UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL 13 (1991).

The Executive Committee of the NCAA "shall consist of 14 members, including at least three women. The president and secretary-treasurer shall be ex officio members with voice and vote and shall be chair and secretary, respectively, of the Executive Committee." NCAA Bylaw Art. 4.2.1. The

[6] *Kemether v. Pennsylvania Interscholastic Athletic Ass'n*, 15 F. Supp. 2d 740 (E.D. Pa. 1998) is similar to the case presented here. In *Kemether*, the district court ruled that the PIAA, an athletic association comprised of Pennsylvania high schools, was an indirect recipient of federal funds subject to Title IX because its member high schools receive federal funds. *Id., citing Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 271-72 (6th Cir. 1994).

[7] The NCAA Bylaws are the Constitution, Operating and Administrative Bylaws and the Administrative Organization reviewed annually at the Convention and that the members vote to revise or not in whole or in part. All references to the Bylaws refer to the Bylaws as published in the 1995-96 NCAA Manual.

Executive Committee is responsible for transacting the business and administering the affairs of the Association.

B. THE NCAA IS AN EXTENSION OF ITS MEMBER COLLEGES AND UNIVERSITIES.

The NCAA has argued and prevailed on the issue that it is an educational institution and no more than its members; therefore, it too should be exempt from state taxes in the same manner that its member institutions are under Kansas law.

> The activities of the NCAA are of the type the member universities and colleges could accomplish by committee except for the number of schools involved and the complexity of the world of major intercollegiate sports. The work of the NCAA staff is that which the members have decreed it shall do for the mutual benefit of, and assistance to, the member institutions' educational programs. We must conclude that the NCAA is but an extension of the member universities and colleges and there is no legislative intent that the extension should be denied the exemption available to the member colleges and institutions.

National Collegiate Athletic Ass'n v. Kansas Dept. of Revenue, 245 Kan. 553, 559, 781 P.2d 726, 730 (1989).

The policies, bylaws and operating procedures for the Association are drafted, revised, accepted and governed by these same member institutions that receive federal financial funds and that have agreed through signed assurances to uphold

federal anti-discrimination laws enacted under the Spending Clause.[8] Conventions are held annually when the polices that direct the operation of the Association are determined and voted on by the member institutions.[9] "Between conventions, the Association is governed by its Council, which appoints various committees to implement specific programs." *Tarkanian*, 488 U.S. at 183.[10]

C. THE PUBLIC AND PRIVATE COLLEGES AND UNIVERSITIES THAT ARE ITS MEMBERS HAVE DELEGATED AN ESSENTIAL, TRADITIONAL STATE FUNCTION TO THE NCAA.

---

[8] While Amici herein argue that the NCAA is its member institutions, they also accept the arguments presented by Amici the National Trial Lawyers Association that the NCAA is a recipient of federal funds. Amicus Michael Bowers has obtained discovery from the NCAA affirming that as a representative of its members, the NCAA has received federal financial assistance through a contractual arrangement with federal agencies and its staff and officers, appointed and confirmed by the member colleges and universities, have signed the required assurances and thus entered into a contractual agreement to abide by the provisions of Title IX, Section 504 and Title VI.

[9] The Convention meets annually during the second week in January to consider and adopt legislative measures for the conduct of the Association. NCAA Bylaw Art. 5.1.1.

[10] The Council consists of 46 members, including the president and secretary-treasurer, twenty-two Division I members, and eleven members from Divisions II and III respectively. NCAA Bylaw Art. 4.1.1. The Council has, among other responsibilities, the power to establish and direct the general policy of the association in the interim between conventions NCAA Bylaw Art. 4.1.3.

"[Education] is perhaps the most important function of state and local governments ... required in the performance of our most basic public responsibilities." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). The NCAA Bylaws identify its fundamental purpose "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body." NCAA Bylaw Art. 1.3.1. The member colleges and universities have relegated an essential function to the NCAA as their governing board responsible for the overseeing the operation of intercollegiate athletics. Many of the member colleges are public entities whose function are prescribed by state laws.

> In pursuit of its fundamental goal and others related to it, the NCAA imposes numerous controls on intercollegiate athletic competition among its members ... Thus, the NCAA has promulgated and enforced rules limiting both the compensation of student-athletes, ... restricted the number of athletic scholarships its members may award, and established minimum academic standards for recipients of those scholarships; and it has pervasively regulated the recruitment process, student eligibility, practice schedules, squad size, the number of games played, and many other aspects of intercollegiate athletics.

Board of Regents, 468 U.S. at 122-123 (citations omitted) (White, J. joined with Rehnquist, J. dissenting).

The NCAA is involved exclusively with regulating and promoting intercollegiate athletic events among its member colleges and universities. There is no serious contention that, generally speaking, physical education and sports programs in universities are not within proper "educational purposes" and we must conclude they are educational. *National Collegiate Realty Corp.*, 236 Kan. at 400, 690 P.2d at 1372.

II. IT SHOCKS THE CONSCIENCE THAT THE NCAA SEEKS TO DISAVOW ITSELF OF ANY RESPONSIBILITY FOR UPHOLDING FEDERAL ANTI-DISCRIMINATION LAWS.

Although ironic that the NCAA would seek to obviate itself of all responsibility for upholding federal anti-discrimination laws, this practice is consistent with the practices of this Association that insists its primary purpose is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body." NCAA Bylaw Art. 1.3.1.

A. PRIOR TO TITLE IX, THE NCAA HAD LITTLE CONCERN FOR ATHLETIC COMPETITION FOR FEMALES.

The passage of Title IX in 1972 saw a surge of interest in women's intercollegiate athletic competition. This Congressional demand for equity among males and females was tied to the spending powers and put a demand on the colleges and universities of the country that they spread their resources equally between male and female athletics or risk losing federal financial assistance in all of the programs and activities of the institution. Title IX specifically applied to college athletics. As Caspar Weinberger, then-Secretary of the U.S. Department of Health, Education, and Welfare, testified in 1975:

> The final regulation [under Title IX] applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives Federal Funds for any of those programs. If Congress wished to excluded [sic] athletics, for example, as so many people seem to wish, Congress could have easily have said so. However, Congress ... made very clear athletics should be covered by the regulation.

S. Rep. 100-64 at 9-10 (Jun. 5, 1987), *quoting* Hearings Before the Subcommittee on Post Secondary Education of the Committee on Education and Labor, U.S. House of Representatives (Jun. 26, 1975) at 438.

The Association for Intercollegiate Athletics for Women (AIAW) had heretofore been the unchallenged regulatory organization for female athletes in the country's institutions of higher learning. Financial expenditures for women's sports increased in the wake of the passage of Title IX. Suddenly it was worth the effort of the NCAA to acknowledge the existence of female athletes. Rather than co-exist with the AIAW, the NCAA elected to challenge its very survival.[11]

The coffers of the AIAW were no match for those of the NCAA; at the time, many colleges and universities had not invested in an athletic program for women and it did not have the number of members or the organizational clout that the NCAA had. Under siege from the NCAA, the AIAW could not compete financially with the resources and power of the combined efforts of the member institutions of the NCAA.

---

11 The AIAW, its importance and financial strength bolstered by Congress's action, negotiated its own television contract for women's championships. AIAW leaders also began talks with [Walter] Byers [then executive director of the NCAA] about granting equal status to women's athletics, allowing each NCAA member university one vote for men's athletics and one vote for women's athletics at its convention. The idea would have significantly changed the way the NCAA did business -- since 90 percent of those voting at conventions are men -- and could have opened the NCAA's financial coffers to the burgeoning demands of rapidly expanding women's programs.

UNDUE PROCESS at 10-11.

As a matter of historical record, the initial involvement of the NCAA in women's athletics was less an act of enlightened altruism than a tactical maneuver contrived by some of the organization's members to fend off potential gender discrimination challenges invoked in the wake of Congress' 1972 enactment of Title IX. *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass'n*, 558 F. Supp. 487, 492 (D.D.C. 1983). Formal NCAA consideration regarding the inclusion of women's sports in the intercollegiate association's activities began at its annual convention in January 1978. *Id.* At that time, the NCAA was firmly rooted in the chauvinist tradition that had attended its creation as an all-male intercollegiate sports concern. However, the pragmatism of the NCAA officials in light of the enormous consequence of potential liability overcame the institutional inertia against including women's sports in the purview of the organization. Having committed itself to the governance of women's athletics, the NCAA aggressively enticed the member institutions that were previously aligned with its pre-existing rivals to associate themselves with its own fledgling enterprise. It accomplished this by aggressively undercutting the other sports governing bodies, spending $3 million in the first year for a $500,000 return on its women's athletics program. UNDUE PROCESS at 11. In short order, the NCAA rose to become the dominant governing body of women's intercollegiate athletics,

rendering competing women's athletic associations defunct in the process. *Id.*

In the present case, the NCAA, having effectively attained monopoly status among associations governing both men's and women's intercollegiate sports, seeks to deny that it is subject to liability under Title IX. The NCAA has gone in less than twenty years from eagerly wrapping itself in the mantle of Title IX in refutation of those who might charge it with gender discrimination to casting Title IX aside as a meaningless constraint on the activities of a wholly exempt enterprise. The irony of this position is matched only by its hypocrisy. The NCAA leadership was prescient in the 1970's in their apprehension that Title IX would indeed be applicable to its activities and consequently impose liability. The organization should not be permitted to deny cavalierly liability under Title IX while simultaneously reaping the benefits of its unattenuated status as a recipient of the funds that so clearly impose Title IX liability.

B. AS CASE LAW AND LEGISLATIVE HISTORY SHOW, CONGRESS INTENDED SECTION 504 TO COVER THE NCAA.

Congress intended the Rehabilitation Act to cure the Nation's "failure to recognize the intrinsic rights of the handicapped." Timothy M. Cook, *The Scope of the Right to*

Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws, 20 LOY. L.A. L. REV. 1471, 1478 (1987). Three years of hearings prior to Section 504's enactment made clear to the lawmakers that "although access would entail burdens, eliminating the evil of exclusion would economically and morally outweigh the costs." *Id.* at 1478-79.

Section 504 signaled a broad Congressional intent to stop federal funding, both directly and indirectly, of programs and activities that discriminate. Congress intended Section 504 to remedy the nation's "shameful oversights" that caused persons with disabilities to be "shunted aside, hidden, and ignored." *Alexander v. Choate*, 469 U.S. 287, 296 (1985), *quoting* 117 Cong. Rec. 45974 (1971)(comments of Rep. Vanik). Section 504 is "commonly known as the civil rights bill of the disabled." *Helen L. v. DiDario*, 46 F.3d 325, 330 (3rd Cir. 1995), *quoting ADAPT v. Skinner*, 881 F.2d 1184, 1187 (3rd Cir. 1989). Congress modeled Section 504 after other federal civil rights statutes, and Section 504's language is substantially similar to that of Title IX and other civil rights laws governing federally-assisted programs. *Helen L.*, 46 F.3d at 330 n. 8.

In stark contrast to Congress's goals in enacting Section 504, the NCAA bylaws on initial eligibility reject the notion that students with disabilities should or could compete in intercollegiate athletics until they have proven themselves

capable in a way that is discriminatory and that poses an undue burden on these students for their own protection. NCAA Operating Bylaws Art. 14.3.1.3 (1996-96)("Courses that are taught at a level below the high school's regular academic instruction level (e.g., remedial, *special education, or compensatory*) shall not be considered core courses *regardless of course content"*)(emphasis added).

It is undisputed the NCAA's member institutions, who constitute the majority of the NCAA, are subject to Section 504 as federally-assisted programs.[12] The NCAA, however, is attempting to exempt itself from the nation's broad rejection of discrimination under Section 504 by disingenuously invoking the Civil Rights Restoration Act. Yet the CRRA's legislative history clearly and undisputably shows Congress's intent to strengthen Section 504 and other civil rights statutes and reject the narrow and erroneous interpretations of Title IX and Section 504 in *Grove City College v. Bell*, 465 U.S. 555 (1984) and *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

As explained in the CRRA's accompanying committee report, Congress enacted the CRRA to overturn *Grove City College* and *Consolidated Rail Corp.* to the extent those cases narrowed the coverage of federal civil rights laws. In those

---

[12] The Office of Civil Rights of the U.S. Department of Education has also held this and other NCAA Bylaws violate Section 504. Letter from Jeanette J. Kim, Director, Policy, Enforcement, and Program Service, Office of Civil Rights, to Daniel Dutcher (May 23, 1994), attached hereto as Appendix "A".

decisions, the Court held that Title IX and Section 504 respectively covered only those programs directly receiving federal funds, and excluded other programs even when part of the same entity. S. Rep. 100-64 at 3 (Jun. 5, 1987). Congress quickly reacted, holding it had meant Section 504 to cover broadly all programs within federally-assisted programs or activities regardless of whether the actual activity in question received federal funding. Congress concentrated particularly on eradicating discrimination from all activities of federally-funded educational institutions, which constitute the NCAA's entire membership. The committee report held, "For education institutions, the bill [S.B. 557, the CRRA] provides that where federal aid is extended anywhere within a college, university, or public system of higher education, the entire institution or system is covered." *Id.* at 4.

The committee report noted Congress had intended broad coverage of Section 504 and explicitly rejected the argument that a program could subdivide its activities into federally funded and non-federally funded programs, thus perpetuating discrimination against people with disabilities and rendering meaningless the goals and aspirations of Congress in enacting Section 504. *Id.* at 6-7; *see Alexander v. Choate*, 469 U.S. at 297 (Congress' "statements would ring hollow" under narrow interpretation of Section 504). As the Committee concluded:

> The inescapable conclusion is that Congress intended that Title VI as well as its progeny -- Title IX, Section 504, and the ADA[13] -- be given the broadest interpretation. All four statutes were passed to assist in the struggle to eliminate discrimination from our society by ending federal subsidies of such discrimination. Congress understood that these goals could be achieved if the Federal government used its power and authority to end discrimination.

S. Rep. 100-64 at 7.

The Committee also commented on a number of cases, decided after *Grove City College*, that the Committee described as "the casualties of the *Grove City* decision." *Id.* at 14. These cases stood for the same rejected principle for which the NCAA now argues -- that a federally-funded program can exclude people with disabilities without regard to Section 504 merely by shifting funding to specific activities at specific times. In a case strikingly similar to the NCAA's position, a firefighter could not sue the fire department because his program received no federal funds, even though revenue sharing funds could have been distributed to the fire department. *Id.* at 14-15, *citing Foss v. City of Chicago*, 640 F. Supp. 1088 (N.D. Ill. 1986).

Finally, the Committee clearly noted Congress' intent to define "ultimate beneficiaries" as persons for whom the federally-financed program was ultimately designed to benefit.

---

[13] ADA refers to the Age Discrimination Act.

Such persons were excluded from coverage under Section 504. As the report shows, Congress clearly intended to limit "ultimate beneficiaries" to those persons the program was designed to help: Congress cited as examples of ultimate beneficiaries "persons receiving social security benefits, persons that receive Medicare and Medicaid benefits, and individual recipients of food stamps." *Id.* at 24-25.

Similarly, in *Department of Transp. v. Paralyzed Veterans*, 477 U.S. 597 (1986), the Court held (and Amici do not dispute) that entities who merely benefit from federal financial assistance are not covered under Section 504. In *Paralyzed Veterans*, the Court ruled Section 504 did not cover airlines merely by virtue of the benefits they receive from federal financed airports. The Court recognized that most federal financial assistance has "economic ripple effects" and declined to extend Section 504 to cover the wide range of persons who benefit from federally-funded airports, including passengers and airport workers. *Id.* at 607-10.

The NCAA cannot reasonably argue it falls within the definition of an ultimate beneficiary similar to airlines or Medicaid recipients. Congress' examples of ultimate beneficiaries clearly unmask the basic flaw in the NCAA's argument: the NCAA directly administers and sets policy for, rather than benefits from, the athletic programs of its federally-

funded member universities. As such, *Paralyzed Veterans* is distinguishable from this case.

The NCAA effectively argues for the rejected principle that colleges and universities should be able to avoid the nation's civil rights laws by delegating certain programs to "private" organizations of which they are members--in fact, of which they are the *only* members.[14] In enacting the CRRA, Congress specifically rejected the idea that federally-funded colleges and universities could re-position or separately designate programs to avoid civil rights laws. This Court should

---

[14] The NCAA's brief quotes a statement from S. Rep. 100-64 concerning Catholic dioceses as proof that Congress meant to exclude the NCAA from "institution-wide coverage" under civil rights laws. Forgiving the NCAA's failure to list the correct page number for the quote, the NCAA takes the Committee's statement wholly out of context. S. Rep. 100-64 states that private corporations, commissions, and public-private partnerships receiving federal assistance are covered as a "program or activity" under Section 504, and the coverage can extend to the entire corporation. *Id.* at 19. The Committee wrote, "The governmental or public character helps to determine institution-wide coverage." Only then does the NCAA-quoted passage concerning Catholic dioceses appear *Id.* at 19.

Again, the NCAA's attempts to identify itself with the example of the Catholic diocese clearly contravenes federal civil rights laws. The NCAA, an unincorporated association of federally-funded member institutions, is the sole governing body for thousands of university athletic programs. As the Committee Report shows, intercollegiate athletic programs are covered by Title IX. S. Rep . 100-64 at 9. The NCAA's role in administering these programs is wholly public in nature, thereby rendering any analogy with the Catholic diocese example as irretrievably flawed.

In any event, the NCAA is indistinguishable from its member colleges and universities, thus rendering the above analysis irrelevant

likewise reject the NCAA's backward, cramped, and invalid view of the nation's civil rights laws.

CONCLUSION

For the foregoing reasons, Amici urge this Court to affirm the Third Circuit's decision in this case.

Respectfully submitted,

Barbara E. Ransom*
*Counsel of Record
Max Lapertosa
PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA
125 South 9th Street, Suite 700
Philadelphia, PA 19107
(215) 627-7100
Counsel for Amici Curiae

December 8, 1998

APPENDIX "A"

UNITED STATES DEPARTMENT OF EDUCATION

MAY 23 1994

Mr. Daniel Dutcher
Director, Legislative Services
National Collegiate Athletic
Association
6201 College Boulevard
Overland Park, Kansas 66211-2422

Dear Mr. Dutcher:

This letter is a follow-up to our April 26, 1994, teleconference. As expressed during the teleconference, the Office for Civil Rights (OCR) has serious concerns that certain National Collegiate Athletic Association (NCAA) Bylaws may operate discriminatorily to exclude qualified individuals with disabilities from participation in intercollegiate athletics programs, or render such individuals ineligible to receive certain benefits, including financial aid, in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulations, at 34 C.F.R. Part 104, as well as Title II of the Americans with Disabilities Act of 1990 (ADA), and its implementing regulations, at 28 C.F.R. Part 35. Section 504 applies to programs and activities that receive Federal financial assistance. Title II of the ADA applies to public entities, including public colleges and universities. Specifically, of concern to OCR is the potential adverse impact on individuals with disabilities of NCAA Bylaws 14.3.1.3, 14.3.1.7.5, and 14.1.6.2.2, as reflected in the 1993-94 NCAA Manual.

NCAA Bylaw 14.3.1.2, which concerns core-curriculum requirements for freshman athletes enrolling in Division I and II institutions, provides that, for purposes of meeting the core-curriculum eligibility requirements for financial aid, practice and competition at Division I and II member institutions, certain courses, "(e.g., remedial, special education or compensatory) shall not be considered core courses regardless of course content." With regard to student-athletes with disabilities, subsection 14.3.1.2.5. further provides that "[t]he NCAA Academic Requirements Committee may approve the use of high-school courses for the learning disabled and [other disabled students] to fulfill the core course requirements if the high-school principal submits a written statement to the NCAA indicating that students in such classes are expected to acquire the same knowledge, both quantitatively and qualitatively, as students in other core courses."

I understand, based on our teleconference, that the purpose underlying the cited NCAA Bylaws is to ensure that students that participate in athletics at the Division I and II levels are academically prepared to meet the rigors of both an educational and athletic program and to benefit from the educational program. We strongly support and encourage the NCAA's goal of ensuring that student-athletes learn and benefit from the education that they are offered.

However, OCR is concerned that, as applied by recipients of Federal funding or public colleges and universities, the above-referenced Bylaws may violate Section 504 or Title II of the ADA. Under the Section 504 implementing regulations, a recipient may not use criteria that have the effect of subjecting qualified individuals with disabilities to discrimination. 34 C.F.R. § 104.4(b)(4). Under the regulations implementing Title II of the ADA, a public entity may not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. 28 C.F.R. § 35.130(b)(8).

Additionally, Section 504 and its implementing regulations, as well as Title II and its implementing regulations, require that colleges and universities make reasonable modifications in policies, practices or procedures (including academic adjustment of non-essential requirements), as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating on the basis of disability against qualified applicants or students. 34 C.F.R. § 104.44(a); 28 C.F.R. § 35.130(b)(7).

We do not find a sufficient basis to conclude that meeting the NCAA core course requirement is essential for every student at every Division I or II institution, in order to participate in the athletics program alongside the institution's academic program. Given the wide variation in the academic competitiveness of colleges and universities, the academic programs they offer, and the academic program elected by any given student, many students with disabilities may be able to participate athletically and succeed academically in the program and institution they select, regardless of whether they meet the specific NCAA core-curriculum requirements. Therefore, we believe that under Section 504 and the ADA, some accommodation or academic adjustment of the core-course requirement may be required in some cases.

Bylaw 14.3.1.2 does not appear to allow for accommodation or academic adjustment by NCAA Division I and II member institutions for qualified students with disabilities. The special

certification requirement, applicable only to disabled student-athletes, appears to attempt to provide some flexibility with regard to accommodating academically the needs of individuals with disabilities in meeting core academic requirements. However, even as modified, the core course requirement is inflexible in that the disabled student still must meet core course requirements virtually equivalent to those for nondisabled students. The inability of a high school principal to provide the required certification would result in an exclusion of otherwise qualified disabled student-athletes from participation in Division I and II intercollegiate athletics programs.

In light of the above-referenced concerns, OCR requests that, with regard to NCAA Bylaws 14.3.1.2 and 14.3.1.2.5, NCAA staff seriously consider allowing Division I and II member institutions more flexibility with regard to the use of certain high-school courses (including remedial and special education courses) in meeting NCAA core-curriculum requirements.

OCR also is concerned that, as applied by federally funded or public colleges and universities, NCAA Bylaw 14.1.6.2.2. also may violate Section 504 or Title II of the ADA. Bylaw 14.1.6.2.2 provides that, "[a]t the time of competition, the student-athlete shall be enrolled in not less than 12 semester or quarter hours, regardless of the institution's definition of a minimum full-time program of studies." The NCAA 12-hour rule requires that Division I, II, and III member institutions exclude from intercollegiate athletics competition otherwise qualified individuals with disabilities who, because of their disabilities, are unable to carry 12 semester or quarter hours.

As noted previously, NCAA member institutions that are within the coverage of Section 504 or Title II of the ADA, are required to make such reasonable modifications to or academic adjustments of nonessential academic requirements as are necessary to ensure that academic requirements do not discriminate against qualified students with disabilities. In our teleconference, you indicated that the basis for the 12-hour rule, like the core course requirement, is to ensure that students are receiving the benefit of an education as well as participating in athletics.

We do not find a basis on which to conclude that carrying 12 semester or quarter hours is essential to achieve this purpose for every student-athlete with a disability at every institution. A student with a disability may be fully participating in the educational program, while carrying a reduced course load as an accommodation. Therefore, we believe that reasonable modification or academic adjustment of this requirement may be required in some cases. An otherwise qualified disabled student may not be excluded from participation in an intercollegiate athletics competition on the basis that, because of a disability, he or she is unable to carry a 12 semester or quarter hour course

load. See 34 C.F.R. § 104.4(b)(1)(i); 28 C.F.R. § 35.130(b)(1)(i).

During the April 26 teleconference with members of my staff, it was stated that legislation is expected to be introduced which, if enacted, would amend the 12-hour rule to permit disabled students enrolled in fewer than 12 semester or quarter hours of study to meet the NCAA full-time enrollment requirement. However, it was expressed that, as currently drafted, Bylaw 14.1.6.2.2 does not incorporate an exception or waiver provision with respect to qualified disabled students.

With regard to Bylaw 14.1.6.2.2., OCR requests that NCAA staff amend the 12-hour rule to permit member institutions to effectively accommodate the disabilities of disabled student-athletes. OCR further requests that the NCAA permit Division I, II, and III member institutions to grant exceptions to or waivers of the 12-hour rule for otherwise qualified individuals with disabilities, pending amendment of Bylaw 14.1.6.2.2.

The above-referenced issues and concerns are important to OCR. We would appreciate your giving these matters the utmost consideration.

Sincerely,

Jeanette J. Lim
Director
Policy, Enforcement, and
Program Service
Office for Civil Rights

cc: Francis Canavan, Group Executive Director for Public Affairs, NCAA

No. 98-84

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1998

National Collegiate Athletic Association,
Petitioner,

v.

R.M. Smith,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR AMICI CURIAE IN SUPPORT OF PETITIONER

Sheldon Elliot Steinbach
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle
Suite 835
Washington, D.C. 20036
(202) 939-9355

Of Counsel
* Counsel of Record

Richard O. Duvall
Robin L. Rosenberg*
David A. Vaughan
HOLLAND & KNIGHT LLP
2100 Pennsylvania Ave., N.W.
Washington, DC 20037
(202) 457-5921

Counsel for Amici Curiae

(Amici listed on inside cover)

American Council on Education
American Association of Colleges of Nursing
American Association of State Colleges and Universities
Association of American Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Council for Advancement and Support of Education
The Council on Governmental Relations
Educational Testing Service
National Association for Equal Opportunity in Higher Education
National Association of Independent Colleges and Universities
National Association of Student Personnel Administrators
National Association of State Universities and Land-Grant Colleges

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

No. 98-84

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1998

National Collegiate Athletic Association,
Petitioner,
v.

R.M. Smith,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR AMICI CURIAE AMERICAN COUNCIL ON EDUCATION; AMERICAN ASSOCIATION OF COLLEGES OF NURSING; AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES; ASSOCIATION OF AMERICAN UNIVERSITIES; ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES; ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES; COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION; THE COUNCIL ON GOVERNMENTAL RELATIONS; EDUCATIONAL TESTING SERVICE; NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION; NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND

UNIVERSITIES; NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS; AND NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES IN SUPPORT OF PETITIONER

The American Council on Education ("ACE"); American Association of Colleges of Nursing; American Association of State Colleges and Universities; Association of American Universities; Association of Community College Trustees; Association of Governing Boards of Universities and Colleges; Council for Advancement and Support of Education; The Council on Governmental Relations; Educational Testing Service; National Association for Equal Opportunity in Higher Education; National Association of Independent Colleges and Universities; National Association of Student Personnel Administrators; and National Association of State Universities and Land-Grant Colleges support the position of the National Collegiate Athletic Association ("NCAA") in this case. The consents of all parties to this case to the filing of this brief have been filed with the Clerk.[1]

INTEREST OF AMICI CURIAE

ACE, founded in 1918, represents approximately 1,800 public and private colleges and universities across the United States, as well as over 175 non-profit educational associations and organizations, including most of the amici.

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the amici curiae, their members or their counsel has made a monetary contribution to the preparation or submission of the brief. See Rule 37.6 of Rules of the Supreme Court of the United States.

ACE's principal purpose is to further the goals of higher education, including the interests of component groups of the academic community: students, faculty, administration, and employees. ACE, like other education associations and organizations, operates independently of its members.

Education associations and organizations like the amici engage in many activities. They sponsor research and publish reports, advocate education goals, such as the need for national investment in higher education, hold professional development seminars, convene task forces, workshops, and meetings of education leaders, and collect and publish statistical information relevant to higher education.

Many of the non-profit educational association and organization members of ACE, including the NCAA, are not recipients of federal financial assistance. Many of them, but not all, receive dues from or charge membership fees to their members which may be recipients of federal financial assistance. Some of those non-profit educational association and organization members of ACE are participating as amici for this brief.

Some non-profit educational organizations, such as ACE, receive federal financial assistance. As a direct recipient of federal financial assistance, ACE is subject to Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. Nevertheless, consistent with ACE's mission of advancing the interests of higher education including those of its component groups of the academic community such as its non-profit education association and organization members, ACE appears herein as an amici.

* * *

The amici wish it to be clear that they are not troubled by being subject to Title IX's obligations where they are recipients of federal funds. In those situations they ". . . are in a position to accept or reject. . ." (United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597, 606 (1986)) the obligations that come with acceptance of federal funds. Thus, ACE, as a direct recipient of federal funds, has no objection to being subject to Title IX and, indeed, fully supports Title IX's goals, as do those amici which are not direct recipients of federal funds and, thus, not covered.

SUMMARY OF ARGUMENT

The decision of the Third Circuit in this case has serious consequences for independent non-profit education associations and organizations which reach far beyond the NCAA. The decision is inconsistent with Congressional intent and this Court's precedent. It will impose burdens upon education associations and organizations that do not receive federal funding, which will adversely affect their ability to perform their missions and threaten the participation of their members which do receive federal funding in establishing and achieving the goals of education associations and organizations. Prior to the Third Circuit decision in this case, none of these organizations had any reason to know that any were covered by the program-specific statutes.

I. ARGUMENT

In United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986), this Court recognized identical language in program-specific statutes such as Title IX, the Education Amendments of

1972, 20 U.S.C. §1681(a)("Title IX") was intended to be given the same meaning.[2] With respect to such statutes which are triggered by the receipt of "Federal financial assistance," regulatory reach is limited to the recipient and does not extend beyond the recipients to mere beneficiaries of such assistance. 477 U.S. at 610.

The Court of Appeals below, however, held that the NCAA -- which does not receive federal financial aid -- is covered by Title IX because it receives dues from many of its members which receive Federal financial aid. R.M. Smith v. National Collegiate Athletic Association, 139 F.3d 180 (1998).[3] In so doing, the Third Circuit recognized that Section 504 of the Rehabilitation Act contains language identical to Title IX with respect to receiving Federal financial assistance. App. 14a. Nevertheless, the Court of Appeals did not apply Paralyzed Veterans' definition of "recipient" to Title IX, holding instead that the receipt of dues by the NCAA from members which receive Federal funds subjects the NCAA to the requirements of Title IX. App. 15a.

Paralyzed Veterans emphasized that federal coverage under program-specific statutes such as Title IX does not

---

[2] The other program-specific statutes include Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) ("Title VI") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). Title VI and Section 504, like Title IX, all use the term "receiving Federal financial assistance" to trigger regulatory coverage. In Paralyzed Veterans, Section 504 was at issue. As the Court explained, this limitation is required by the contractual nature of these laws as spending clause legislation.

[3] The Third Circuit opinion is reprinted in the Appendix to the Petition for a Writ of Certiorari ("App."). All appendix citations herein will be to that appendix.

"follow[] the aid past the recipient to those who merely benefit from the aid." Id., 477 U.S. at 607. The Third Circuit distinguished Paralyzed Veterans stating that the NCAA is "not merely an incidental beneficiary of federal funds;" (App. 16a) and that the recipient of the federal funds in Paralyzed Veterans could not be said to be a "surrogate" for the alleged beneficiary of the funds. Id. The Third Circuit stated that the alleged "relationship between the members of the NCAA and the organization itself is qualitatively [different than the relationship in Paralyzed Veterans] . . . ." Id. Respondent's claim was also characterized as follows:

> the NCAA receives dues from member institutions, which receive federal funds. As discussed above, this allegation would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss.

App. 19a. The Third Circuit's attempt to distinguish Paralyzed Veterans fails and must be reversed.

A. The Third Circuit's Decision Expands The Coverage Of Title IX "Almost Without Limit" To Any Non-Profit Education Association Or Organization.

In Paralyzed Veterans, this Court pointed out that in limiting coverage to recipients of federal financial assistance, Congress imposes the obligations of program-specific statutes ". . . upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds. In this case, the

only parties in that position are the airport operators." 477 U.S. at 606. The Court warned that "*beneficiaries* should not be confused with intended *recipients*." Id. (Emphasis in original). In Paralyzed Veterans, it was ". . . clear that the airlines do not actually receive the aid; they only benefit from the airports' use of the aid." Id. at 607. To decide otherwise would give "almost limitless coverage" to program-specific statutes by reason of the term "receiving Federal financial assistance." See id. at 608.

In this case, the Third Circuit achieves a result contrary to Paralyzed Veterans with an unnecessarily broad interpretation of an administrative regulation adopted before Paralyzed Veterans was decided. With respect to dues, the Circuit Court stated that the receipt of dues by an organization from members which receive federal funds ". . . would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds. . . ." App. 19a.

Membership dues are not federal financial assistance. And, the receipt of dues by an association or other organization should not be an indicia that the entity is "receiving Federal financial assistance." In such circumstances, the association is in no position to even know whether any member is a recipient of federal funds. Cf. Gebser v. Lago Vista Indep. Sch. Dist., 118 S.Ct. 1989, 1998 (1998)(basing regulatory coverage upon contract between funding agency and recipient which provides "notice" to recipient). Moreover, the receipt of federal funds by a member in no way suggests that the association was intended by Congress as the recipient of any part of the federal funds. Thus, this Court has stated that federal coverage in these situations does not "follow[] the aid past the recipient to those who merely benefit from the aid."

Paralyzed Veterans, 477 U.S. at 607. There is no reason to chart a different course here.

By imposing Title IX upon education associations and organizations by reason of membership dues, those entities are not ". . . in a position to accept or reject. . ." the obligations imposed by Title IX. Associations which support the goals of Title IX but cannot afford the costs of meeting many of the burdens of Title IX -- designations of a compliance official, recordkeeping and reporting requirements, compliance audits -- may be forced to limit their membership or raise their dues. In either event, they will be hampered in accomplishing their missions; moreover, excluded members will be denied opportunities to participate in developing and achieving the goals of education associations and organizations.

B. The Third Circuit's Concept Of "Surrogate" Is Contrary To *Paralyzed Veterans* And Difficult To Apply.

In addition to the indicia of dues, the Third Circuit found that the NCAA is essentially a "surrogate" for its members many of which receive federal funds. App. 14a. Thus, it concluded that the NCAA is not merely an "incidental beneficiary of federal funds" and that the relationship between the NCAA and its members is "qualitatively different" than the relationship analyzed in Paralyzed Veterans. App. 16a.

The Third Circuit described the relationship between the NCAA and its members as follows:

> The NCAA is an unincorporated association comprised of public and private colleges and universities and is responsible

> for promulgating rules governing all aspects of intercollegiate athletics, including recruiting, eligibility of student-athletics, and academic standards. The member institutions agree to abide by and enforce these rules. . . .

App. 3a.

* * *

> The NCAA acts no less than the association in Horner as an agent of its member institutions merely because it lacks statutory authority for its activities. The NCAA is a voluntary organization created by and comprised of the educational institutions which essentially acts as their *surrogate* with respect to athletic rules.

App. 14a (emphasis added).

The Circuit Court attempted to distinguish the relationship in Paralyzed Veterans from the relationship between the NCAA and its members, stating that, in Paralyzed Veterans, the commercial airlines were "merely an incidental beneficiary of federal funds" received by airports. See App. 16a. In fact, the relationship between airports and airlines had been described by the District of Columbia Circuit Court of Appeals as being "'inextricably intertwined'" with the "'indissoluble nexus'" being commercial air transportation. See Paralyzed Veterans, 477 U.S. at 610, citing Paralyzed Veterans of America v. CAB, 752 F.2d at 714. The District of Columbia Court of Appeals had found commercial airlines to be part of a federally assisted program because they used airports which were

recipients of federal funds and because "airports are 'indispensable' to air travel." Id.

Just as the District of Columbia Circuit's reasoning in Paralyzed Veterans was found to be "overbroad and unpersuasive," the "surrogate" reasoning of the Third Circuit in this case fails. See id. This Court stated that the Court of Appeals reasoning would mean that "various industries and institutions would become part of a federally assisted program or activity, not because they had received federal financial assistance, but because they are 'inextricably intertwined' with an institution that has." Id. Such an interpretation would give the term "receiving federal financial assistance" in Section 504 of the Rehabilitation Act ". . . a scope broader than its language implies, and one never intended by Congress." Id. at 611. This Court therefore refused to "fuse" airports and commercial airlines into a single program or activity, emphasizing that reference to grant statutes rather than "hypothetical collective concepts" like the nexus rationale advanced by the respondent in Paralyzed Veterans is the proper basis for determining whether a program or activity is covered. Id.

In this case, the Circuit Court did not look at any grant statutes by which members of the NCAA receive financial aid to determine whether the NCAA is a recipient of federal financial aid under those statutes. Rather, the Third Circuit found that the NCAA is a "surrogate" for its members and by use of a different term than in Paralyzed Veterans "fused" the NCAA and its members. This is precisely the type of analysis rejected by the Court in Paralyzed Veterans; it should be rejected again. Otherwise, educational associations and organizations, like amici, will have no sure basis for determining whether they are "surrogates" for their members and the jurisdictional determination whether an

entity is covered by the program-specific laws will be heavily factbound and unpredictable.

C. The Third Circuit's Decision Imposes Burdens Upon Non-Profit Education Associations and Organizations Which Will Adversely Affect Their Ability To Perform Their Education Missions.

In addition to the uncertainty that the Third Circuit's "surrogate" theory of regulatory coverage imposes upon education associations and organizations not receiving federal funds, those associations and organizations will be burdened with the administrative requirements and costs imposed upon entities subject to Title IX coverage -- even though prior to this case, those private entities had no reason to know they were covered in the first place. This will strain already stringent budgets in many cases and will divert personnel from other duties to assure compliance with Title IX regulations for recordkeeping and reporting. In addition, these associations and organizations will be subject to the cost and diversion of staff resources to defend themselves against attenuated claims that they are "surrogates."

Where the claim is based upon dues paid by members, many of these associations will be faced with excluding members to limit their exposure to costly litigation or be forced to raise dues (an unrealistic choice where existing dues are a limiting factor for members). Either way, education associations and organizations are likely to lose members. As a result, both the association's, as well as members', ability to participate in developing and advancing education policy will be stifled.

The imposition of these costs and burdens are particularly inappropriate where education associations will

not have had the opportunity "to accept or reject" the obligations that come with being an actual recipient of federal financial assistance. Rather, they will have been unduly burdened by a strained, "almost limitless" interpretation of the term "receiving Federal financial assistance."

II. CONCLUSION

The decision of the Third Circuit avoids this Court's conclusions in Paralyzed Veterans that regulatory coverage under program-specific statutes, such as Title IX, does not "follow[] the aid past the recipient to those who merely benefit from the aid"; and that grant statutes must be examined to determine whether an entity is a recipient of federal aid rather than resort to "hypothetical collective concepts." For these reasons, the judgment of the United States Court of Appeals for the Third Circuit in this case should be reversed.

Respectfully submitted,

Sheldon Elliot Steinbach
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle
Suite 835
Washington, D.C. 20036
(202) 939-9355

Richard O. Duvall
Robin L. Rosenberg*
David A. Vaughan
HOLLAND & KNIGHT LLP
2100 Pennsylvania Ave., N.W.
Washington, DC 20037
(202) 457-5921

Of Counsel

Counsel for Amici Curiae

* Counsel of Record